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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 541

RISS AND COMPANY, INC., A CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

STATEMENT AS TO JURISDICTION

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Civil Action No. 4806

RISS & COMPANY, INC.,

Plaintiff,

vs.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,

Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant, Riss & Company, Inc., submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment and decree of the District Court entered in this cause.

Opinion Below

The opinion of the District Court for the Western District of Missouri has not yet been reported. A copy of the memorandum opinion of the District Court containing the findings of fact, conclusions of law and judgment and a copy

of the final decree are attached hereto as Appendix A. This action was consolidated for trial with Civil Action No. 4974 which is not involved in this appeal. Accordingly, portions of the memorandum opinion relating only to Civil Action No. 4974 are omitted from Appendix A.

Jurisdiction

The judgment of the District Court was entered on September 27, 1951. A petition is presented to the District Court herewith, to-wit, on November 26, 1951. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515; *American Trucking Association* v. *United States*, 326 U. S. 77; *United States* v. *Detroit and Cleveland Navigation Company*, 326 U. S. 236.

Questions Presented

1. Whether an order of the Interstate Commerce Commission relating to the unitary activity of a motor carrier is valid and can be sustained where in portions of the order the Commission has made no findings upon which judicial review can be based.

2. Whether an order of an administrative agency or an order of the Interstate Commerce Commission can be sustained where only general, indefinite findings have been made and the specific facts found are at variance with the facts of record or fail to include a portion of the facts derived from the same documents as the facts found.

3. Whether a court reviewing an order of the Interstate Commerce Commission can properly disregard or fail to consider uncontradicted and substantial evidence on the

record considered as a whole which is opposed to determinations of the Interstate Commerce Commission which determinations are based wholly upon indefinite findings disregarding and failing to reflect such evidence.

4. Whether in an order granting or denying rights under Section 206(a) of the Interstate Commerce Act, the Commission, as the District Court in its opinion states, "must take into consideration certificates and rights which have been granted other carriers".[1]

Statutes Involved

This case involves the application of Section 206(a) of the Interstate Commerce Act, 49 U. S. C. § 306(a) and Section 10 of the Administrative Procedure Act, 5 U. S. C. § 1009. These sections are set out in Appendix B hereto.

Statement

Appellant, plaintiff below, hereinafter referred to as Riss, is a common carrier by motor vehicle holding certificates of public convenience and necessity issued by the Interstate Commerce Commission. This action was brought to suspend, set aside and permanently enjoin orders of the Interstate Commerce Commission, hereinafter referred to as Commission, dated February 3, 1945, and October 4, 1948, in so far as the orders deny certificates of public convenience and necessity sought by Riss or its predecessor in interest under Section 206(a) of the Interstate Commerce Act.

Proceedings were initiated on January 23, 1936, by Monark Motor Freight System, Inc., a predecessor of appellant, hereinafter referred to as Monark. Monark filed with the Commission an application under Section 206(a) for

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[1] All the points raised in the Assignment of Errors are also presented. The questions presented stated above set forth the major issues.

a certificate of public convenience and necessity for the transportation by motor vehicle of general commodities over routes, to points and within territories in the states of Missouri, Kansas, Nebraska, Kentucky, Iowa, Illinois, Indiana, Ohio, Pennsylvania, West Virginia, Virginia, Maryland, New Jersey, New York, Delaware, Rhode Island, Connecticut and Massachusetts.

Informal hearings were held and following requests of various rail carriers and railroad associations formal hearings were held in 1939. Additional hearings were held in 1942. Riss purchased all operating rights and property of Monark in 1942 with the requisite approval of the Commission,[2] and succeeded to all of Monark's as yet undetermined rights. Following the submission of briefs and examiner's report and order and exceptions thereto, Division 5 of the Commission on February 3, 1945 issued its report and order granting a portion of the routes and points claimed in the application and denying the remainder. Riss filed a Petition for Reconsideration and the Commission vacated that portion of this order denying operating authority over nine route segments for further consideration of the record.

On May 7, 1946, appellant filed with the Commission a Petition for Reconsideration of the entire order of February 3, 1945. Promptly after the denial of this petition, Riss filed the original complaint in the present suit. The statutory court held the matter in abeyance until such time as the Commission might reconsider the portion of the order relating to the nine route segments. On October 4, 1948 the Commission entered its order on this aspect of the case. Following issuance of a certificate of public convenience and necessity on February 20, 1950, granting Riss operating

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[2] *Riss—Purchase—Monark Freight System, Inc.*, 38 M.C.C. 563.

authority in accordance with these two orders, an amended complaint and answers thereto were filed in the instant suit.

Of the two orders challenged herein, the order of February 3, 1945, despite its length and detail, in certain instances contains no findings as to certain claimed rights and in other instances, the findings as made are inadequate and indefinite. Moreover, the order is not based upon substantial evidence on the whole record. The order discusses each of the claimed regular routes and the showing of service to the intermediate and off-route points located on or near such routes. As to these routes and points, the order contains initial and preliminary findings of facts, in the form of a listing of shipments to and from the various intermediate and off-route points. Inasmuch as the Commission stated that it would give little if any consideration to the oral testimony, but would primarily base its findings upon the documentary evidence, the order premises the grant or denial of service over the routes upon the showing made as to the intermediate and off-route points on such routes.

Following the listing of shipments disclosed by the documentary evidence to have been carried to and from the various points, the order contains a discussion relating to the service on each claimed regular route. Within this discussion will be found the basic findings upon which the grant or denial of authority to serve such points is predicated. In almost every instance this finding is of the most general, nonparticularized sort. For example, the finding with respect to the many intermediate points denied on Monark's claimed route No. 1 is as follows:

> "From the foregoing evidence it will be observed that no shipments have been transported over or to some of these points prior to June 1, 1935, and that at certain others no service has been performed since that time. In some instances there have been long lapses of oper-

> ation at some points * * * at still other points the services have been very unsubstantial."

As another example, in the findings with respect to the service to the points in the vicinity of Philadelphia, the order states that:

> "* * * many were not served prior to the statutory date, others were served prior to, but not after such date, some were not served until 1937, 1938, 1939, 1940, and even until 1941, and * * * long lapses occurred in the operations to and from many of these points. The services at still others of such points have been very unsubstantial. For these reasons authority to continue operations to and from such points will be denied."

Among the points denied upon the basis of this finding was Camden, New Jersey, a highly important, integral part of the industrial complex of Philadelphia. In connection with this point, which is used merely as an example, it is clear from the whole record that the Commission failed to consider documentary evidence of shipments to Camden which were made prior to the statutory date or in the interim period and that numerous shipments during the period of so-called lapse of service were overlooked. It was and is impossible to determine from these findings definitely why or upon what basis the Commission denied to Monark authority to serve this point. Indefinite findings of the nature indicated are found throughout the order. In addition, the order contains absolutely no finding with respect to the highly important claimed regular route over U. S. Highway No. 1, between New Haven, Connecticut and Boston, Massachusetts.

The order of October 4, 1948, which granted to Monark the right to serve over seven of the nine route segments but denied authority to serve any of the intermediate or off-

route points on such route segments, contains the same general and indefinite findings with respect to such denials.

Upon final hearing on the merits, held on April 17-19, 1950, the District Court sustained the orders of the Commission and dismissed the complaint. The District Court held that, with exceptions noted in the opinion, the Commission's orders were supported by adequate findings and were based upon substantial evidence. With regard to the appellant's claim for authority to operate over U. S. Highway No. 1 between New Haven, Connecticut and Boston, Massachusetts, the District Court found that the Commission had made no finding of any nature with respect to this claim of appellant. The Court stated that, without a specific finding, it was unable to determine the basis upon which the Commission had denied appellant authority to operate over this route. The Court ruled that, with this one exception, the matters involved were ripe for judicial review. The District Court held that with regard to determination of appellant's authority to operate in and to commercial zones of important cities, the Commission must take into consideration certificates and rights which have been granted to other carriers.

The Questions Involved Are Substantial

This appeal presents for decision the question of the necessity of findings in an order of the Interstate Commerce Commission and, more particularly, the question of the necessity of adequately definite findings fully expressing the basis for denials of rights. The orders here challenged fail to include in certain cases any findings whatsoever with respect to important portions of the motor carriers' claimed rights. Moreover, the findings contained in the orders challenged are so indefinite, general, and non-particularized as to preclude judicial review. The standard utilized by the Commission in denying to appellant authority to operate in

accordance with its claimed rights is not only unknown, but unknowable. The specific bases for the denials is in nearly every instance impossible to determine. Furthermore, although appellant demonstrated to the reviewing court that great masses of pertinent documentary evidence had been disregarded or ignored by the Commission in its determinations, the District Court was unwilling to undertake a review of the whole record to determine whether or not the findings lacked substantial evidentiary support or whether the Commission had arbitrarily denied rights to appellant on its preconceptions of what those rights should be.

If, after a disclosure of clear disregard of pertinent evidence resting upon the same footing as the evidence otherwise considered, denials of rights in an administrative order which are premised upon indefinite, non-particularized findings of the sort found in this order, cannot be set aside by a reviewing court, then no administrative order which utilizes the general language of the statute in its denial portions, can be set aside. Therefore, the questions involved are substantial and important not only to appellant, but to all persons involved in the administrative process.

1. The decision of the District Court is plainly erroneous in failing to remand the proceedings to the Commission for further consideration and the entry of specific findings. It is well settled by the Supreme Court that a conclusion of the Interstate Commerce Commission denying authority to a motor carrier for the transportation of general commodities over claimed routes and to claimed points requires not only evidence to support it, but findings of sufficient definiteness to express it. *Florida* v. *United States*, 282 U. S. 194; *United States* v. *Carolina Freight Carrier's Corp.*, 315 U. S. 475. Where the Commission concededly fails to make such findings a remand of the proceedings

to the Commission is appropriate and necessary, for without specific findings, judicial inquiry is halted at the threshold. *United States* v. *Carolina Freight Carrier's Corp., supra; Howard Hall Co.* v. *United States*, 315 U. S. 495. In the present case the District Court held that the Commission failed to make any findings whatsoever in explanation of its denial to Riss of authority to operate over U. S. Highway No. 1 between New Haven, Connecticut and Boston, Massachusetts. Nonetheless, although the Court stated that without a specific finding it could not apprehend the reason for the Commission's denial, it failed to remand the proceeding to the Commission for entry of definite and specific findings. Appellant submits that this failure of the District Court was erroneous and requires reversal of the judgment below.

2. The ruling of the District Court that the orders of the Commission contain adequate findings is clearly erroneous. As noted, above, the orders in certain instances contain no findings of any nature in regard to the denials of important rights. In other instances, particularly with respect to a large number of intermediate and off-route points which were denied, the order contains findings which are wholly inadequate to disclose the standard applied to the evidence in order to arrive at the denials. Thus the Commission denies appellant the right to serve a particular point on the basis of a finding which is so indefinite and general as to amount to nothing more than a paraphrase of the words of the statute.

In this connection, the statute requires that an applicant be granted operating authority to serve a point if it can prove "bona fide operation" to such point since prior to June 1, 1935. The Supreme Court in a number of cases has defined the phrase "bona fide operations" to mean that if the evidence shows that there was (1) no service prior to

the statutory date or (2) sporadic, as distinguished from substantial, service, or (3) long lapses in the service, the standard of bona fide operation has not been met. *Alton R. Co.* v. *United States*, 315 U. S. 15; *United States* v. *Maher*, 307 U. S. 148; *United States* v. *Carolina Freight Carrier's Corp., supra.* It is plain, therefore, that the Commission in denying appellant authority to serve certain points on the basis that "many were not served prior to the statutory date, others were served prior to, but not after such date, some were not served until 1937, 1938, 1939, 1940, and even until 1941, and that long lapses occurred in the operations to and from many of these points" has merely restated the language of Section 206(a) of the Interstate Commerce Act. It is completely impossible to determine which one of these statutory criteria was applied to the evidence to arrive at the ultimate denial of rights.

Such an indefinite finding is particularly objectionable when, as here, it can be demonstrated that the initial findings of fact were almost wholly in error. It was shown both to the Commission and to the Court that the findings of fact included only a portion of the facts of record while the Commission ignored or disregarded the remainder of the evidence which was of precisely the same character and weight. Neither the Commission nor the United States contended in the District Court that the orders were correct in their factual determinations but, on the contrary, it was conceded (although this was not pointed out in the Court's opinion) both in brief and in oral argument that much of the evidence had been disregarded by the Commission and that this ignored evidence came from the same documents and was of exactly the same weight and character as the evidence considered by the Commission.

If, for example, the Commission had denied the point of Camden, New Jersey solely on a basic finding that there was

no service at that point prior to the statutory date, it might have been possible to set the order aside since it was shown to the Court that the Commission's finding of fact that there was no service prior to the statutory date was completely in error. With the generalized type of basic findings made by the Commission upon which its ultimate denial is predicated, it is impossible either for the appellant or for the reviewing court to say that the denial was based on this or any other reason or combination of reasons. It would equally well have sufficed for the Commission to have said that as to some points they felt that the standard of bona fide operation had been met while as to others for no specified reason they felt that the standard had not been met.

If this case is permitted to stand, not only is it possible for an administrative agency to deny rights merely by paraphrasing the statute without definitely assigning a reason for such denial, but also will it allow an agency to make denials without having to know or to find all the facts of record? Appellant respectfully submits that this violates all concepts of the requirements of fair administrative process.

3. The District Court upheld the Commission's orders on the basis that "apparently" there was substantial evidence to support the action taken and that the orders were not entered arbitrarily or capriciously. It is, of course, elementary that the Commission's orders, if supported by substantial evidence on the record considered as a whole, are valid. It may be further conceded that the Commission is the judge of the credibility of witnesses and weight of the evidence, *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, and that due deference must be paid to the expertise of the Commission. *Rochester Telephone Corp* v. *United States*, 307 U. S. 125. However, it is equally plain that where, as here, an order of the Commission is based

upon only part of the evidence and substantial portions have been ignored without rational basis, such order is arbitrary and unsupported by the evidence. *Baltimore & O. R. Co.* v. *United States*, 264 U. S. 258, 267. The Commission is unable to determine whether the statutory standard of bona fide operation has been met without considering the evidence offered to meet the standard. If the Commission can take only part of the evidence as it did in this proceeding and refuse to consider or ignore the existence of the remainder, the statutory right may be denied or reduced without reference to any standard.

And where the reviewing court likewise refuses to consider the whole record and the evidence offered to prove bona fide operation on the statutory date, basing its holding only upon the Commission's findings which in turn are based on only portions of the evidence, judicial review becomes a rubber stamp. Appellant submits that it is perfectly plain, merely from reading the opinion of the District Court, that the Court did not consider the evidence on the whole record, particularly the mass of evidence opposed to the Commission's determination. The frequent quotations from the very orders attacked, given as proof by the Court that the Commission did consider all the evidence, and the references to the Commission's "apparent" close consideration of the evidence, all demonstrate that the District Court did not examine the whole record but merely based its conclusions upon the Commission's own statements.[3] The entire opinion fails to disclose that the Court was even aware of the exhibits which appellant presented to the Court at the hearing on the merits which showed clearly the wholesale manner in which the Commission had disregarded the

[3] For example, at Page 26 of its Memorandum Opinion, the District Court states that "If the report of the Commission is carefully read, one cannot escape the conclusion that the Commission considered very thoroughly all of the evidence * * *".

uncontradicted evidence in the record before it. Surely, consideration of the whole record, within the meaning of Section 10 of the Administrative Procedure Act, at the very least requires the reviewing judge to read and consider, if not *all* the evidence, then those portions cited to him, and not merely the challenged report and order.

Appellant submits that although the Commission's findings are entitled to respect, they are not deserving of the absolute finality which the District Court gave them when the record before the Court clearly precludes the denial portions of the Commission's orders from being justified by a fair estimate of all the evidence on the record considered as a whole. The decision of the District Court clearly fails to adhere to the standards of judicial review recently stated by the Supreme Court, *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474; *N. L. R. B.* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, and on this issue the case should be remanded to the court for rehearing in accordance with law.

4. Furthermore, the decision of the District Court is manifestly erroneous by reason of the fact that it holds that the Commission must take into consideration certificates and rights which have been granted to other carriers in determining appellant's rights to serve the commercial zones of large cities on appellant's authorized routes. It is well settled by the Supreme Court that, on the contrary, the Commission may not give any weight in such determinations to the fact that competing carriers may be also certificated to serve the commercial zones and the right to a statutory grant may not be withheld or reduced because the Commission disapproves of the competitive conditions which may be created if the application is granted. *United States* v. *Carolina Freight Carriers Corp., supra.* In addition to this error of law which the District Court made in this aspect

of the case, it also ignored the showing made by appellant which disclosed that the Commission had disregarded masses of pertinent evidence proving service in and to the Commercial Zones of cities on the claimed routes. This failure to examine the whole record before the Commission evidences disregarded by the District Court of applicable standards of judicial review. *Universal Camera Corp.* v. *N. L. R. B., supra.*

The decision of the District Court and this entire proceeding is, of course, of great significance to appellant. Its outcome will seriously affect and hamper its ability to operate and to perform efficiently and economically the services which it is required to provide under certificates in force and by virtue of its status as a common carrier. Appellant, or its predecessor in interest, has, since prior to June 1, 1935, been engaged in providing fast, convenient and economical transportation of freight between the areas of the Central Middle-West to the west of the Mississippi River and points on the Eastern Seaboard. From the beginning, it has been faced with the most stubborn and persistent opposition from those interests most antagonistic to the concept of integrated, long-haul motor carriers, with all the advantages inherent in this form of transportation. The case is therefore, important not only to appellant but also to all persons, carriers and shippers alike, interested in seeing that the long-haul motor carrier is permitted to achieve its rightful role in the national transportation scheme as contemplated by the Motor Carriers Act of 1935.

But the case is of even wider significance than in its impact upon appellant and its effect upon the development of an integrated national transportation policy. The administrative order under review presents in the clearest possible way the basic issue with respect to the adequacy of findings required in an administrative order and the

extent to which a court can require an agency to base its conclusions on all the facts. It raises the issue of whether or not administrative agencies must express their basic conclusions in findings definite enough to disclose the rationale employed and the premise for the conclusions reached. Appellant respectfully submits that adequately definite findings are an absolute necessity if the reviewing court is to discharge the duty of reviewing administrative decisions to determine their substantial evidentiary support on the whole record as required by Section 10(e) of the Administrative Procedure Act. We believe that the questions presented by this appeal are substantial and that they are of importance to all persons seeking administrative determination of rights.

Respectfully submitted,

JOHN B. GAGE,
WENDELL BERGE,
A. ALVIS LAYNE, JR.,
Counsel for Plaintiff-Appellant.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

Nos. 4806-4974

RISS AND COMPANY, INC., a corporation, *Plaintiff*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

MEMORANDUM-OPINION

Riss and Company, a corporation, organized under the laws of the State of Colorado, with its principal place of business in North Kansas City, Missouri, filed these suits to set aside certain orders of the Interstate Commerce Commission, alleging the denial to it of the right to serve certain routes, intermediate and off-route points which it claims the right to serve under the "grandfather clause" of the Motor Carrier Act of 1935 § 206(a) of the Interstate Commerce Commission Act; 49 U. S. C. 306(a) and upon 49 U. S. C. 305(g), and 28 U. S. C. 1398, 2321-2325.

The complaint alleges among other things that the orders of the Commission and the proceedings are unlawful and invalid insofar as they deny operating authority claimed by the plaintiff in its applications, because the Commission failed to consider relevant evidence, and on the grounds that the orders are not supported by substantial evidence, and are abitrary and capricious.

Plaintiff's alleged rights are based upon its application to continue service which it contends had been rendered by it prior to the critical date under the Act (June 1, 1935), and under the rights derived by it through the purchase of the Illmo Trucking Service, Inc., and the Monark Motor Freight System, Inc.

In case No. 4974 plaintiff, Riss & Company, seeks to enjoin the orders of the Commission made with respect to its rights

as an original operator and as derived through the purchase of the Illmo Trucking Service, Inc., and in Case No. 4806 plaintiff seeks to set aside the orders with respect to the denial of the rights to serve certain routes and route segments, and intermediate and off-route points on such routes and route segments, which plaintiff claims were denied to it in violation of its grandfather rights. The cases were consolidated for the purposes of hearing.

The original application filed by the plaintiff as such was known as "Docket No. MC-200" and when Riss & Company acquired the rights of the Illmo Trucking Service, Inc., which was pending before the Commission at that time, the two applications were assigned Docket No. MC-200 (Sub. No. 7). After filing application MC-200 plaintiff filed numerous other applications and they were assigned numbers subsequent to 200. It is in this proceeding that plaintiff seeks to enjoin the actions of the Commission in Case No. 4974.

Upon the acquisition of the Monark Motor Freight System, Inc., it was assigned Docket No. MC-200 (Sub. No. 46) and it is in this case number that plaintiff seeks to enjoin the Commission in Case No. 4806.

* * * * * * *

THE FACTS WITH RESPECT TO THE APPLICATION OF THE MONARK MOTOR FREIGHT SYSTEM, INC., AND ITS ACQUISITION BY RISS & CO., INC.

On January 23, 1936, and within the time prescribed by the Motor Carrier Act, Monark Motor Freight System, Inc., a Missouri corporation, filed with the Commission under the grandfather clause of the statute, an application for a certificate of public convenience and necessity for the carriage of general commodities over the routes, to points and within territories in the 19 states of Missouri, Kansas, Nebraska, Colorado, Texas, Oklahoma, Iowa, Illinois, Indiana, Ohio, Pennsylvania, West Virginia, Maryland, New Jersey, New York, Delaware, Rhode Island, Connecticut and Massachusetts. The application was assigned Docket No. MC-30077. A comparison of this application with that of Riss MC-200 reveals that Monark sought to serve the

same states plaintiff served, Delaware, Rhode Island and Connecticut, which Riss did not or had not served.

After informal hearings held before District Supervisors of the Commission, and pursuant to report filed by them, an order was entered by the Commission on March 3, 1938 which contained a description of the routes, termini, intermediate and off-route points served by Riss within commercial zones at important cities; irregular route rights for certain specified commodities, and the type of service to be rendered, and authorized the issuance of the described authority upon compliance with certain other sections of the Act. Thereafter a large number of protestants intervened. The Commission revoked the March 3 order and issued a second compliance order of June 13, 1938.

On March 20, 1939 the Commission set aside the compliance orders of March 3, 1938 and June 13, 1938 and a hearing was held in June 1939. Approximately sixty railroads and truck lines entered their appearance and participated in the hearings, which was exhaustive. Following the hearing, the examiner recommended the grant of some of the routes and points sought in the application and denied the remainder of the rights sought by the plaintiff.

In April 1942 Richard R. Riss, plaintiff's controlling stockholder and Chairman of the Board, acquired control of the Monark Motor Freight System, Inc., through the purchase of 60% of its outstanding capital stock. This acquisition of the Monark System was approved by the Commission on March 13, 1942.

Before any further action was taken with respect to the grandfather rights application proceeding, Riss & Co., Inc., purchased all the operating rights and property of Monark Motor Freight System, Inc. This action was likewise approved by the Commission on September 28, 1942 and confirmed in the plaintiff all rights of Monark in and to certificates of public convenience and necessity under the "grandfather" clause of the statute. The application following the purchase by Riss, was assigned Docket No. MC-200 (Sub. No. 46).

Prior to that time Monark had petitioned for a further hearing on the grounds of inadequate time for preparation

and discovery of new evidence. The Commission reopened the proceeding and the second hearing was held in April 1942, with respect to the rights of the applicant under the "grandfather" clause.

In January 1943, the examiner filed an intermediate report and recommended granting to the petitioner certain routes, and denied others. To this order the plaintiff filed exceptions on the ground that the conclusions:

> "(1) were not justified by the evidence;
> (2) were contrary to law, and that the examiner had erred in that he failed to find that the plaintiff was entitled to operate over all routes to which claim has been made or to serve all intermediate points on the regular routes and certain off-route points, as prayed for, and that he had also erred in failing to find applicant entitled to serve the City of Boston and its commercial zone."

On February 23, 1945 the Commission issued its final report and order in which it denied to plaintiff the right to operate over nine route segments, which were portions of the routes which had been allowed to the plaintiff, and the right to serve certain commercial zones and important termini and intermediate points on its authorized routes.

On March 16, 1945, the plaintiff filed Petition for Reconsideration of the denial portions of the Commission's order and to stay the effective date thereof as to the nine route segments and the commercial zones and intermediate and off-route points described in its order of February 3, 1945.

On April 23, 1945 the Commission, upon its own motion, entered an order reopening the proceedings designated as "Docket No. MC-200 (Sub. No. 46) for the purpose of determining whether plaintiff had been in bona fide operation since April 28, 1942 as a carrier by motor vehicle between the points, over the routes, and within the territory covered by the application (Monark) of January 23, 1936. The Commission denied the Petition for Reconsideration shortly thereafter, as to the nine route segments, and on August 14, 1945 (two days before the effective date of the order) plaintiff filed suit in the United States District Court

for the Western District of Missouri at Kansas City, against the United States of America and Interstate Commerce Commission seeking to enjoin enforcement of the order insofar as it denied to the plaintiff the nine route segments claimed by it.

On November 12, 1945 a three-judge court was convened and a temporary stay order restraining enforcement of the denials was issued. Thereafter, on December 3, 1945 the Commission entered an order which it contends was voluntary on its part, vacating that portion of its order of February 3, 1945 affected by the temporary stay order (the 9 route segments) for further consideration on the same record.

On May 9, 1946, plaintiff filed with the Commission a request in writing for leave to file a petition for reconsideration of all the applications for grandfather rights of both plaintiff itself and predecessor corporation, which plaintiff had acquired. This is the application heretofore described in connection with Riss and Illmo applications in Case No. 4974.

On July 23, 1946 leave was granted to file petition for reconsideration and it was filed on October 1, 1946. The Petition for Reconsideration was filed while the so-called "provider" case was pending (under the order of the Commission entered April 23, 1945 to determine the question of compliance).

On July 8, 1947 the Commission refused plaintiff's petition for Reconsideration filed October 11, 1946 and expressed its intention to immediately enforce those provisions of the order of February 3, 1945 which constituted denials of the operating rights to plaintiff over the nine route segments. Thereafter, on July 23 the plaintiff filed its original complaint in this case seeking to enjoin the enforcement of the denial portions of the orders of February 3, 1945.

The Commission had not yet reconsidered and passed upon the question of plaintiff's right to operate over the nine route segments, and the other issues which had been vacated by the Commission from the order of February 3, 1945 subsequent to the filing of the first suit to enjoin the enforcement of that portion of the order. The suit filed

July 23, 1947 did not come on for hearing until October 9, 1948.

On June 10, 1948 pursuant to the hearing under the Commission's order of April 23, 1945 it was found that plaintiff had not been operating as a common carrier within the meaning of the Act and required it to substitute and render reasonably continuous service within sixty days. The changes required by the Commission were made by the plaintiff, and on January 31, 1949 the Commission found that the plaintiff's new method of operation met the Commission's requirements, and on the same day the Commission also entered an order providing for further hearings, for the purpose of determining whether or not Riss & Co., Inc., was conducting its business in compliance with the order of June 10, 1948.

On February 9, 1948, the three-judge court convened for hearing plaintiff's complaint. At that time the "provider plan" investigation was still pending, and because of this fact, the court did not deem it advisable to dispose of the controversy, and entered an order which included the following language:

> "The Commission has thus in all respects treated the situation as if any phase of it that it desired to touch was still a pending matter (or, more accurately, part of a still pending proceeding), in the sense that none of complainant's vested rights arising out of Monark's grandfather operations or the determination of them has become fixed or final, so as to be beyond the Commission's power to summarily control, change and make further pronouncements. Again it appears that the Commission is also further engaged in an investigation of whether, since the grandfather rights cut-off date, Complainant has so changed its mode of operations that it can no longer claim to be a common carrier and so has no right to any certificates at all. And in dealing with this question and in countermanding the effective date of its previous certificate-right determination, it purportedly is acting under its powers of determining initial certificate rights and not under the

statutory provisions for revoking rights previously determined and fixed."

The route segments denied to the plaintiff in the order of February 3, 1945, were:

"(a) Between Decatur, Ill., and Indianapolis, Ind., over U. S. Highway 36.

(b) Between Shoals, Ind., and Louisville, Ky., over U. S. Highway 150.

(c) Between Indianapolis, Ind., and Chicago, Ill., over U. S. Highway 52 and 41.

(d) Between Cincinnati, Ohio, and Mansfield, Ohio, over U. S. Highway 42.

(e) Between Cincinnati, Ohio, and Zanesville, Ohio, over U. S. Highway 22.

(f) Between Fort Wayne, Ind., and Toledo, Ohio, over U. S. Highway 24.

(g) Between Cleveland and Lisbon, Ohio, over Ohio Highway 14; and between Salem and Liston, Ohio, over Ohio Highway 45.

(h) Between New York, N. Y., and Springfield, Mass., over U. S. Highways 1 and 5.

(i) Between Baltimore, Md., and Philadelphia, Pa., over U. S. Highways 40 and 13."

On October 4, 1948, the Commission entered its order relating to the 9 route segments above described, and found that the plaintiff was entitled to grandfather rights over 7 of the 9 route segments, with certain reservations with respect to off-route and intermediate points. The routes granted and the reservations are as follows:

"1. Between Decatur, Ill., and Indianapolis, Ind., over U. S. Highway 36.

No service is authorized to or from Decatur.

2. Between Shoals, Ind., and Louisville, Ky., over U. S. Highway 150.

No service is authorized to or from Shoals.

3. Between Indianapolis, Ind., and junction U. S. Highways 52 and 24 (near Kentland, Ind.) over U. S. Highway 52.

No service is authorized to or from the said junction.

4. Between Cincinnati, Ohio, and Zanesville, Ohio, over U. S. Highway 22.

No service is authorized to or from Zanesville.

5. Between Fort Wayne, Ind., and Toledo, Ohio, over U. S. Highway 24.

No service is authorized over this route between Toledo, on the one hand, and, on the other, points east of the Illinois-Indiana State Line.

6. Between Cleveland, Ohio, and Deerfield, Ohio, over Ohio Highway 14.

No service is authorized to or from Deerfield.

7. Between New York, N. Y., and Springfield, Mass., over U. S. Highway 1 to New Haven, Conn., and thence over U. S. Highway 5 to Springfield.

No service is authorized to or from any intermediate point on the above-described routes."

The effective date of the order was December 13, 1948. When this order was entered, the "provider plan" investigation was still pending.

On January 26, 1950, a hearing was held by the three-judge court upon the application of the defendants and intervenors for the purpose of securing a final hearing on the merits of this action. At the time of this hearing the Commission had not issued to plaintiff its final certificate of public convenience and necessity, but subsequently the Commission did issue a certificate of public convenience and necessity. This certificate became effective February 21, 1950 and incorporated within its contents the operating authority granted in the orders of February 3, 1945 and October 4, 1948.

On April 4, 1950 the plaintiff filed an amended complaint in which it sought to enjoin the Commission from enforcing this certificate, and also to set aside the denial portions

of the order (the route segments included in the denials of the October 4, 1948 order) and described in its complaint as:

> "(1) A segment of U. S. Highway 41 between its junction with U. S. Highway 24 and its junction with U. S. Highway 30; This is a north-south route, part of the route between Chicago, Indianapolis and Louisville.
>
> (2) A segment of U. S. Highway 42 between Cincinnati, Ohio, and Mansfield, Ohio.
>
> (3) A segment of Ohio State Highway 14 between U. S. Highway 224 and U. S. Highway 30. This is a small but highly important segment, on the most direct and natural route from Cleveland to Philadelphia and New York.
>
> (4) U. S. Highway 40 between Baltimore, Maryland and Philadelphia, Pennsylvania.
>
> (5) U. S. Highway No. 1 between New Haven, Connecticut and Boston, Massachusetts."

Most of these segments served as connecting links between main east and west routes and run north and south.

The contention of the Government with respect to the issues involved in Case No. 4806 are the same as those involved in case No. 4974 heretofore discussed, i.e., they are not properly before the court for review, due to the plaintiff's failure to exhaust its administrative remedies, and in the event the court should determine that the issues should be reviewed, the court should find that the evidence of record supports the findings and conclusions of the Commission.

With the exception of the one route "U.S. Highway No. 1 between New Haven, Conn., and Boston, Mass.," which will be discussed hereafter, we think the issues are properly before the court for review.

In the report of the Commission of October 4, 1948 the evidence with respect to each of the 9 route segments under consideration at that time was reviewed and additional findings were made. On Sheet 5 of the Commission's report, it used this language:

> "Each of the route segments will be discussed separately. In arriving at our conclusions as to whether

> or not applicant is entitled to 'grandfather' rights with respect to the route segments, we shall consider all shipments which might reasonably have moved over the segment in question. In other words, if the particular route segment would constitute part of the natural arteries of travel between points actually served on and since the statutory date and there is some evidence that the route segment actually was used, appropriate authority will be granted to continue operations over such route segment."

We think it is not necessary to repeat what the Commission has said in its order of October 4, 1948 relative to each of the routes in controversy, but in accordance with its statement above quoted, the Commission apparently reviewed very carefully the evidence with respect to all of the 9 route segments in controversy, discussed the evidence as to the time and nature of the service shown to have been rendered by the plaintiff over said routes and to the intermediate and off-route points, and based its findings and conclusions upon such evidence. The report covers numerous pages of the Commission's order. With respect to the denied route, the Commission, after this complete surveillance of the record, held there was no showing that plaintiff had served such routes or segments prior to or during the critical period.

With regard to the other routes . . . the ones allowed with reservations . . . the Commission carefully considered the evidence as to the alleged service by the plaintiff to the points allowed, and upon its finding that plaintiff failed to serve the denied intermediate and off-route points, refused plaintiff the right to serve said intermediate and off-route points. We are quoting herein the findings of the Commission with respect to one of the denied routes . . . the segment between Indianapolis and Chicago, and described in the plaintiff's brief as:

> "A segment of U.S. Highway 41 between its junction with U.S. Highway 24 and its junction with U.S. Highway 30; This is a North-South route, part of the route between Chicago, Indianapolis and Louisville."

"Indianapolis-Chicago.—This route segment embraces U.S. Highways 52 and 41 between Indianapolis and Chicago. It is part of claimed route 15 between Louisville and Omaha, from Louisville over U.S. Highway 31 through Seymour to Indianapolis, thence over U.S. Highway 52 to its junction with U.S. Highway 41, thence over U.S. Highway 41 to Chicago, thence over highways described in other routes to Omaha. Portions of claimed route 15 have been granted in the prior report, namely, between Louisville and Indianapolis, and between Chicago and the junction of U.S. Highway 41 and U.S. Highway 30 near Dyer, Ind. Thus the only portion of the described route segment requiring consideration is U.S. Highway 52 between Indianapolis and the junction of that Highway with U.S. Highway 41, and U.S. Highway 41 between the last-described junction and the junction of U.S. Highways 41 and 30 near Dyer. This segment connects (near Kentland, Ind.) with applicant's authorized route over U.S. Highway 24 between Peoria, Ill., and Fort Wayne.

"There is some oral evidence which indicates that during the prior period shipments from Louisville to Omaha and Council Bluffs were transported over U.S. Highway 31 to Indianapolis, thence over U.S. Highway 52 to its junction with U.S. Highway 41, thence over U.S. Highway 41 to Chicago, and thence over other highways to destination. Shipments from Louisville to Omaha and Council Bluffs were heretofore discussed in connection with the Shoals-Louisville route segment. In any event, it would appear that the more direct and natural route for shipments from Louisville to Omaha and Council Bluffs would be over the Shoals-Louisville route segment, thence over applicant's authorized routes through St. Louis and Kansas City to destination.

"There is no documentary evidence of operations by applicant between Chicago and Louisville, or between Indianapolis and Chicago during the prior or interim periods. It is probable, however, that portion

of this route segment was used by applicant in connection with operations between Omaha and Cincinnati. Thus in the prior report, the division, in discussing operations over claimed route 7 between Omaha and New York City, through Peoria and Fort Wayne, stated:

> 'In the prior and interim periods and thereafter, applicant also transported various commodities between Omaha and New York, respectively, and intermediate points on route 7, and between such respective termini, on the one hand, and on the other, numerous points on its routes. With regard to Omaha, the more substantial operations were to and from Cincinnati—* * *.'
>
> "A natural and direct route between Cincinnati and Omaha would be over applicant's authorized route from Cincinnati to Indianapolis, thence over that portion of the Indianapolis-Chicago segment consisting of U.S. Highway 52 from Indianapolis to junction U.S. Highway 24 near Kentland, and thence over applicant's authorized routes through Peoria and Galesburg, Ill., to Omaha. As stated, applicant has rendered a substantial operation between Cincinnati and Omaha. In the circumstances, we conclude that applicant is entitled to authority to continue the transportation of general commodities with exceptions, over U.S. Highway 52 between Indianapolis and junction U.S. Highway near Kentland. No service, however, is shown to have been rendered by applicant on or prior to the critical date to or from the said junction or intermediate points on U.S. Highway 52. Accordingly, the application to this extent will be denied."

This is typical of the Commission's apparent close consideration of the evidence of all of the routes, segments of routes, intermediate and off-route points, which are the subject of the controversy. Finally, in its general discussions and conclusions, the Commission used this language:

> "*General Discussion and Conclusions.*—In the foregoing discussion we have considered all the evidence

presented by applicant relative to the actual use of the nine route segments described, as well as the service rendered at points located thereon. The documentary evidence listing representative shipments transported by applicant is of value in that it indicates whether operations have been conducted on and continuously since the critical date, and the substantiality of the service performed. In the matter of the described route segments, it is seen that they are not claimed as complete routes in and of themselves, but either as portions of other and, in many instances, longer routes between other termini or as connecting links in forming such routes. In determining what highways were used, or reasonably could be said to have been used, in connection with these routes, we have considered all of the evidence. Included in such evidence is the testimony of qualified witnesses presumably familiar with the operations of applicant on and since the critical date. We also have taken into consideration the existence of natural and direct highways between the termini of the principal routes claimed, to which the instant route segments are adjunct or alternative, the rendition or nonrendition of service at intermediate points on the routes affected, and the substantiality and continuity of service where afforded. In our opinion, the evidence warrants the granting of authority to continue operations in the transportation of general commodities, with the exceptions noted, between the points, over the routes, and in the manner set forth in our findings herein.

"The routes granted herein will form portions of through routes from and to various parts of applicant's authorized system of regular routes, and service therefore will be authorized over any combination of the routes granted herein with those presently authorized, regardless of whether the routes joined have a common authorized point of service".

The only other route involved in this order was U. S. Highway No. 1 between New Haven, Connecticut, and

Boston, Massachusetts, with respect to which the plaintiff contends that no findings were made either in the order of February 3, 1945 or of October 4, 1948. Later in this memorandum we will discuss the disposition of this particular route or route segment separately from the ones included in the plaintiff's complaint.

If the report of the Commission is carefully read, one cannot escape the conclusion that the Commission considered very thoroughly all of the evidence with respect to Monark's service over the disputed routes prior to the critical period and made its findings and conclusions with respect thereto.

The Commission is the fact-finding body. The court does not make findings of fact, but simply determines whether or not the Commission's finding are supported by substantial evidence. Although the Court and the Commission might differ with respect to the weight of the evidence, or what the evidence reveals, yet that does not give the Court the right to decide whether or not the Commission is mistaken in its findings, if there is substantial evidence upon which to base those findings. In reviewing the evidence there may be instances where our finding would be different from that of the Commission, but we have no authority to substitute our opinion for that of the Commission, any more than an appellate court has the right to substitute its views as to the facts for that of a trial court or jury.

While a finding is not made with respect to the testimony of each and every witness and each and every exhibit, the over-all question of the weight of the evidence with regard to the particular route or the particular town sought to be served, is made. It is our thought that unless a request is made to the Commission to make specific findings as to particular issues or evidence—a basic or essential finding, if supported by the evidence, is sufficient to uphold the Commission's order. (*Florida* v. *U. S.*, 282 U. S. 194, 209). We think there was substantial evidence upon which to base the Commission's findings.

As heretofore indicated, the plaintiff insists that the Commission failed to make any finding whatsoever as to

"U. S. Highway No. 1 between New Haven, Conn., and Boston, Mass." either in its order of February 3, 1945 or any subsequent orders thereto, including the order of October 4, 1948 with respect to the 9 route segments. We do not know, and no one has informed us, whether or not the failure of the Commission to definitely make a finding as to this route in its disposition of the issues was an error, or whether it was intentional.

As we stated with respect to the same question heretofore determined in regard to Case No. 4974, we are unable to determine whether or not the Commission failed to take into consideration the evidence in relation to this route, and if so, whether or not that evidence was sufficient to sustain its views, or whether or not its actions were arbitrary and capricious. We think the plaintiff should call the Commission's attention specifically to this particular phase of the case so that it may correct the error, if there is an error, and if not, it may make the proper finding upon which to base a judicial review. As the situation stands, this question is not yet ripe for judicial review.

The next contention of plaintiff is in relation to the Commission's denial to it of the right to serve commercial zones in most of the major terminal areas to which it is authorized to operate. It is contended that the denial of such rights is clearly opposed to the evidence and not grounded upon any rational or consistent basis. These areas were not included in the Petition for Reconsideration of the 9 route segments, or in the Commission's order with respect to that petition. Plaintiff in its brief alleges that the February 3, 1945 certificate permits it to operate in the commercial zones of Kansas City and Chicago only, and that it is restricted to the municipal limits in its operation of these cities as of Boston, New York, Philadelphia, St. Louis, Cleveland and Cincinnati among others.

It is further contended that the commercial zones of a city include municipal or unincorporated towns contiguous or adjacent to the base municipality, and that the commercial areas of such cities, because of the tremendous growth outside of the municipal limits thereof, are in many instances more important in commercial and industrial ac-

tivity than the municipalities themselves, and that to deny it the right to serve such commercial zones is a violation of its rights.

Plaintiff has not cited to us any specific definition of the phrase "commercial zone." The court may take judicial notice of the fact that the industrial and business development outside of many of the large cities has grown to tremendous proportions, as plaintiff suggests; that because of such development, in many instances it is not possible for large cities to extend their municipal boundaries, and it is likely that such industrial and commercial growth will continue to expand far beyond the municipal limits of such cities.

We are not able to judicially define the term "commercial zone" with sufficient definiteness to make it apply to each and every city. We think, because of the vast experience of the Interstate Commerce Commission in resolving such questions, that where such an issue arises, the Commission's judgment, unless clearly legally unreasonable, should be accepted. In making its findings as to commercial zones, the Commission unquestionably must decide many questions of fact which the court is not empowered to determine, and must take into consideration certificates and rights which have been granted to other carriers.

Of course, it is easily conceivable that from a financial standpoint it would be far more profitable to a carrier if it were permitted to serve the commercial zones in cities such as described above without restriction, but the Congress has conferred upon the Commission the authority to determine such questions. It is obvious that as a matter of law, the Commission cannot act capriciously or arbitrarily in arriving at its conclusions.

After carefully considering the various elements pertaining to this issue, it is our opinion that the Commission has not acted arbitrarily or capriciously in this instance. The decision of complex transportation matters requires the exercise of the highest degree of judgment, not obtained without intricate detail and such matter is not properly the function of the reviewing court. (*New York* v. *U. S.*, 331 U. S. 284, 335; *Board of Trade* v. *U. S.*, 314 U. S. 534, 546).

Plaintiff is engaged in an extensive and complex operation covering routes extending in more than 20 states, from the Rocky Mountains on the west, to the Atlantic Coast on the east; from Massachusetts on the north, to Oklahoma on the south. When one considers the many complex problems incident to a determination of the rights of the plaintiff, and those through whom it claims, the Commission unquestionably has experienced great difficulty in arriving at the correct factual situation presented by the great amount of evidence submitted by the plaintiff.

In addition to this particular claimant, the Commission has also been required to study and determine many applications from other motor carriers seeking grandfather rights in the same states, in the same areas, over the same routes and to the same intermediate and off-route points. When one contemplates the entire situation, the Commission in determining plaintiff's rights apparently has established the parity between future operations and bona fide prior operations for which the Act was obviously designed. (*U. S.* v. *Carolina Carrier Corp.*, 315 U. S. 475; *Alton Rr. Co.* v. *U. S.* 315 U. S. 15).

It is our opinion, after careful consideration of the entire record in both cases, that with the exceptions noted in this memorandum as to certain questions with respect to which plaintiff has not exhausted its administrative remedies, the Commission's orders are supported by adequate findings and conclusions, based upon substantial evidence, and plaintiff's complaint is hereby dismissed.

HARVEY M. JOHNSEN,
Judge U. S. Court of Appeals.

ALBERT L. REEVES,
Judge U. S. District Court.

R. M. DUNCAN,
Judge U. S. District Court.

DATED: SEPTEMBER 27, 1951.

Appendix A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

Nos. 4806—4974

Riss and Company, Inc., a Corporation, *Plaintiff*,

vs.

United States of America and Interstate Commerce Commission, *Defendants*

Judgment Entry

This cause having come on for hearing on April 17, 1950, and the court having heard the evidence and arguments of counsel, said cause was taken under consideration.

After having duly examined the evidence and being fully advised, the court finds that the plaintiff is not entitled to a vacating of the orders of the Interstate Commerce Commission in the respective cases, for the reasons set out in the Memorandum Opinion this day filed, and the complaint is dismissed.

It is therefore ordered and adjudged that plaintiff's complaint be and it is hereby dismissed, and the costs thereof taxed against the plaintiff.

Harvey M. Johnsen,
Judge, United States Court of Appeals;

Albert L. Reeves,
Chief Judge, United States District Court;

R. M. Duncan,
Judge, United States District Court.

Dated: September 27, 1951

APPENDIX "B"

STATUTES INVOLVED

Interstate Commerce Act, Act of February 4, 1887, as amended August 9, 1935, c. 498, 49 stat. 543, 49 U. S. C. § 301, et seq.

Sec. 206(a), as added August 9, 1935, c. 498, 49 stat. 551, and amended June 29, 1938, c. 811, Sec. 8, 52 Stat. 1238 and September 18, 1940, c. 722, Title I, Sec. 20(c), 54 Stat. 923:

(1) Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: provided, however, That, subject to section 310 of this title, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service, only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307(a) of this title and such certificate shall be issued or denied

accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: And provided further, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any state to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter.

Administrative Procedure Act. Act of June 11, 1946, c. 324, 60 Stat. 237, 5 U. S. C. § 1001, et seq. Sec. 10, 5 U. S. C. § 1009:

Except as far as (1) statutes preclude judicial review of (2) agency action is by law committed to agency discretion—

(a) Right of Review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and Venue of Action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Reviewable Acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute,

agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) Interim Relief.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of any agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

Civil Action No. 4806

RISS AND COMPANY, INC., PLAINTIFF,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

MOTION TO AFFIRM

Appellees, United States of America and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States move that the judgment of the district court be affirmed. This is a direct appeal from the final judgment entered on September 27, 1951, by a specially constituted district court of three judges convened pursuant to Section 2284, Title 28, of the United States Code, dismissing appellant's complaint seeking to set aside two orders of the Interstate Commerce Commission. Appeal was allowed on November 26, 1951, and appeal papers were served on November 28, 1951.

The Commission's orders dated February 3, 1945, and October 4, 1948, directed the issuance of a

certificate of public convenience and necessity to appellant granting it substantial operating authority pursuant to the provisions of the "grandfather clause" of Section 206(a) of the Interstate Commerce Act as amended (49 U.S.C. 306(a), as a common carrier by motor vehicle of general commodities (with specific exceptions not here material) over certain regular routes, and of specified commodities over irregular routes. The Commission denied appellant authority to conduct other operations sought in its application. The tortuous and protracted character of the proceeding to determine appellant's grandfather rights is set forth below.[1]

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[1] The Commission proceedings relating to the issuance of the orders herein sought to be set aside, recorded in Dockets Nos. MC-30077 and MC-200 (Sub. 46), were instituted by Monark Motor Freight System Inc., plaintiff's predecessor in interest, on January 23, 1936, by the filing of its application for operating rights under the "grandfather clause". By this application *Monark* sought a certificate for the carriage of general commodities over routes, to points and within territories in the 19 states of Missouri, Nebraska, Colorado, Texas, Oklahoma, Iowa, Illinois, Indiana, Ohio, Pennsylvania, West Virginia, Maryland, New Jersey, New York, Delaware, Rhode Island, Connecticut, Massachusetts. On March 3, 1938, the Commission issued to appellant a so-called "compliance order" providing for the grant of specific operating rights; thereafter upon the intervention of a large number of protestants the Commission revoked the March 3 order and issued a second "compliance order" on June 13, 1938; on March 20, 1939 the Commission set aside the compliance orders theretofore entered and hearings were begun in June 1939. Approximately, 60 railroads and truck lines entered their appearance and participated actively in such hearings. An examiner's proposed report and order was issued on February 13, 1940, but upon the request of the appellant additional hearings were held, and a second examiner's proposed report and order was entered on January 14, 1943. (At or

The instant action came on for hearing together with another action involving other orders granting additional rights sought by appellant under the "grandfather clause" (Civil Action No. 497), before the three-judge district court in April of 1950. The orders involved in both actions were unanimously sustained in a comprehensive opinion rendered by the court on Setpember 27, 1951.

Appellant contends generally that the Commission's grant of rights less than those claimed is unsupported by or contrary to the evidence of record, not supported by adequate findings, and contrary to the spirit and intent of governing statutes. More specifically, appellant contends: (1) Since the Commission made no specific finding as to

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about this stage of the proceedings appellant acquired control of all of the outstanding capital stock, operating rights and property of *Monark* pursuant to the Commission's orders entered March 13, 1942 and September 28, 1942.) On February 3, 1945 Division 5 of the Commission issued a report and order granting appellant substantial operating authority, but denying it among other things the right to operate over nine (9) route-segments forming portions of, or intersecting, routes granted to the appellant. On March 16, 1945, appellant filed a petition for reconsideration of the Commission's order insofar as it related to the denial of the so-called nine (9) route segments; said petition was denied by the Commission on August 14, 1945 and plaintiff thereupon filed suit in the district court seeking to set aside and enjoin the 1945 order of division insofar as such authority was concerned. On November 12, 1945 a three-judge district court issued an order staying temporarily that portion of the 1945 order sought to be reviewed by plaintiff and on December 3, 1945 the Commission on its own motion entered an order setting aside such portion of its order and reopening that issue for reconsideration. As a result of the Commission action the litigation was dismissed by plaintiff. (On or about the date of the 1945 order the Commission on its own motion initiated a completely separate proceeding to investigate the status of

the grant or denial of one route, the court erred in not remanding the entire proceeding to the Commission; (2) the Commission's order contains only general, indefinite findings and its specific findings are at variance with the facts of record or are incomplete; (3) the district court in affirming the Commission's order, did not properly perform the task of judicial review; (4) the district court misinterpreted the factors which the Commission may consider in determining "grandfather" applications.

The assignment of errors and jurisdictional statement show that the appeal actually raises only the general questions usually presented in cases arising under the "grandfather clause." The pro-

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plaintiff as a "common carrier by motor vehicle". The merits of the issue involved in the investigation of plaintiff's so-called "provider plan" of operation have no relevancy to the matters involved in this appeal and no discussion of the reports and orders of the Commission issued in connection with such proceedings need be presented.) Subsequent to the issuance of the 1945 report and order of Division 5, and the reopening of the proceedings for reconsideration by the entire Commission only as to the denial of the so-called segments issue, no action with respect to other findings and conclusions set out in the 1945 report and order was undertaken by appellant until long after the expiration of the time usually permitted by the Commission's rules of practice, when on May 9, 1946 plaintiff filed with the Commission a request for leave to file a petition for reconsideration addressed to all orders in this and other proceedings. Permission to file this petition was granted by Commission on July 23, 1946. Such a petition was filed by plaintiff on October 11, 1946, and on July 8, 1947, the Commission denied the relief therein requested. On October 4, 1948, the Commission issued its report and order on reconsideration on the so-called segments issue. This proceeding was then filed by appellant seeking to enjoin the orders of February 3, 1945, and October 4, 1948.

ceedings before the Commission on such applications primarily require only the submission of proof of bona fide services prior to and subsequent to the crucial date of June 1, 1935, provided in the act.[2] The issue customarily presented on judicial review of such proceedings is whether the findings of the Commission in regard to past bona fide operations are supported by the evidence of record. Here both the action of the Commission and decision of the district court are in full accord with the principles laid down by ths Court in similar cases. We submit, therefore, that the appeal presents no substantial question.

We shall not attempt to reproduce the details of the Commission's discussion, findings and conclusions with respect to the countless factual issues it was required to resolve in determining appellant's claims of "grandfather" rights. The Commission's 1945 report covers some 150 printed pages. The operating rights which the Commission has granted to it are of very wide scope. As the district court noted, appellant "is engaged in an extensive and complex operation covering routes extending in more than 20 states from the Rocky Mountains on the west, to the Atlantic Coast on the east, from Massachusetts on the north, to Oklahoma on the south."

The character of the Commission's consideration

[2] The provisions of Sections 206(a) of the Act are set forth in the Appendix to appellant's Statement as to Jurisdiction.

and rulings is indicated by the following description of the Commission's order of February 3, 1945, in appellant's jurisdictional statement:

> The order discusses each of the claimed regular routes and the showing of service to the intermediate and off-route points located on or near such routes. As to these routes and points, the order contains initial and preliminary findings of facts, in the form of a listing of shipments to and from the various intermediate and off-route points. * * *
>
> Following the listing of shipments disclosed by the documentary evidence to have been carried to and from the various points, the order contains a discussion relating to the service on each claimed regular route. Within this discussion will be found the basic findings by which the grant or denial of authority to serve such points is predicated.

Thus appellant's own statement shows that the Commission (1) considered the claims made by appellant, (2) discussed the evidentiary support applicable to the routes and points of service involved, (3) made initial and preliminary findings of facts relative to such routes and points of service, and (4) made the basic findings granting or denying service over such routes or to such points.

The district court quoted the following from the Commission's report of October 4, 1948:

> Each of the route segments will be discussed separately. In arriving at our conclusions as

> to whether or not applicant is entitled to "grandfather" rights with respect to the route segments, we shall consider all shipments which might reasonably have moved over the segment in question. In other words, if the particular route segment would constitute part of the natural arteries of travel between points actually served on since the statutory date and there is some evidence that the route segment actually was used, appropriate authority will be granted to continue operations over such route segment.

The district court, after setting forth this quotation, stated:

> We think it is not necessary to repeat what the Commission has said in its order of October 4, 1948, relative to each of the routes in controversy, but in accordance with its statement above quoted, the Commission apparently reviewed very carefully the evidence with respect to all of the 9 route segments in controversy, discussed the evidence as to the time and nature of the service shown to have been rendered by the plaintiff over said routes and to the intermediate and off-route points, and based its findings and conclusions upon such evidence.

The district court's opinion sets forth as an illustration the Commission's findings and conclusions with respect to one of the route segment issues, and said that it was "typical of the Commission's apparent close consideration of the evi-

dence of all of the routes, segments of routes, intermediate and off-route points, which are the subject of the controversy." The district court further states:

> If the report of the Commission is carefully read, one cannot escape the conclusion that the Commission considered very thoroughly all of the evidence with respect to Monark's services over the disputed routes prior to the critical period and made its findings and conclusions with respect thereto.

Appellant complains because the Commission, in dealing with the many factual issues, before it, did not pin-point the precise ground for some of its findings. The district court noted that while the Commission did not make a finding with respect to each and every exhibit and the testimony of each and every witness, it made findings on the over-all weight of the evidence relating to the particular routes or particular towns sought to be served. The court said that unless the Commission is requested to make specific findings as to particular issues or evidence, its basic or essential findings, if supported by the evidence, are sufficient to uphold its order. And the court concluded that the Commission's findings had substantial evidentiary support.

Appellant in its jurisdictional statement asserts that the United States and the Commission con-

ceded in the district court that "much of the evidence had been disregarded by the Commission and that this ignored evidence * * * was of exactly the same weight and character as the evidence considered by the Commission." This statement has a breadth which, we think, is misleading. What was conceded was merely that there were some inaccuracies in the Commission's evidentiary findings as to the number of past shipments, during a part of the relevant period, to particular points. The position of the present appellees was that these inaccuracies, relating only to a part of the period as to which appellant had to establish bona fide operation, were immaterial because other findings correctly reflecting the evidence established lack of bona fide operation to these points as to part of the critical period.

We submit, therefore, that the appeal presents no substantial question as to the adequacy of the Commission's findings or the judicial review thereof by the district court.

Appellant also contends that the district court erred in not remanding the proceeding to the Commission in view of the Commission's failure to make findings relative to appellant's claimed right to operate over an alternate route via U. S. Highway No. 1 between New Haven, Connecticut and Boston, Massachusetts. But appellant's petition for reconsideration by the entire Commission did not re-

quest any ruling, or object to any lack of finding, as to this route. The district court therefore properly held that appellant, not having exhausted its administrative remedy in this respect, was not in a position to obtain judicial review of the matter. The court said:

> As we have stated with respect to the same question heretofore determined in regard to Case No. 4974,[3] we are unable to determine whether or not the Commission failed to take into consideration the evidence in relation to this route, and if so, whether or not the evidence was sufficient to sustain its view, or whether or not its actions were arbitrary and capricious. We think the plaintiff should call the Commission's attention specifically to this particular phase of the case so that it may correct the error, if there is an error, and if not, it may make the proper finding upon which to base a judicial review. As the situation stands, the question is not yet ripe for judicial review.

---

[3] The effect of appellant's failure to include in its petition for Commission reconsideration matters subsequently urged as error in the district court proceeding was dealt with at some length in the portion of the district court's opinion dealing with Case No. 4974. This part of the opinion has been omitted from the copy of the court's opinion attached to the appellant's jurisdictional statement. We have set forth in the Appendix to this motion a copy of the omitted portion of the court's opinion dealing with the effect of lack of specification of particular error, in the petition for reconsideration filed by the Commission.

Appellant's remaining point is that the district court erroneously stated that the Commission, in determining operating rights claimed under Section 206(a) of the Interstate Commerce Act, must take into consideration rights which had been granted to other carriers. Even if this statement is assumed to be erroneous, it is not ground for reversal. The issue is the validity of the Commission's determination. But appellant does not contend, nor would the record support the contention, that the Commission, in ruling upon appellant's rights, gave consideration to the operating rights of other carriers.

The district court's statement was made with reference to appellant's contention that, when the Commission found that it was entitled to operate to and from certain cities, the Commission should have found that the area which it had the right to serve was not confined to the cities' municipal limits but included their respective commercial zones. The district court said that appellant had not cited any specific definition of the phrase "commercial zone"; that the Commission's judgment, because of its vast experience in resolving such questions, should be accepted unless clearly unreasonable; that the Commission, in determining the area as to which there had been prior "bona fide operation," must decide many questions of fact which the court is not empowered to deter-

mine; and that the Commission must take into consideration the operating rights granted to other carriers. We submit that the latter statement, in its context, is simply a recognition of the informed judgment which the Commission was in a position to exercise after having passed upon similar questions as to the scope of the area of service when ruling upon operating rights claimed by other carriers.

The Commission's report and the district court's decision clearly show that the Commission applied the proper test of substantiality of service in determining the scope of appellant's bona fide operations as a common carrier by motor vehicle during and subsequent to the "grandfather" period, as approved by this Court in *United States* v. *Carolina Carriers Corporation*, 315 U. S. 475. See also, *Howard Hall Co.* v. *United States*, 315 U. S. 495, 498-499. In the *Carolina Carriers* case the Court said (480-481):

> The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission. *Alton R. Co.* v. *United States*, *ante*, p. 15. The Act provides the test of "bona fide operation." That standard carries the connotation of substantiality. It also makes clear that a holding out to serve a specified area is not alone sufficient. It is "actual rather than potential or simulated service" which is required. *McDonald* v. *Thompson*, 305 U. S.

> 263, 266. Substantial, as distinguished from incidental, sporadic, or infrequent, service is required. Substantial service actually rendered may have been confined to narrow limits. *Loving* v. *United States*, 32 F. Supp. 464, aff'd. 310 U. S. 609. Ability to render the service throughout the wide reaches of the territory, which the applicant professed to be willing to serve, may not have existed.

The Court in that case also said (p. 486) that "an applicant's status may vary from one part of the territory to another or be different in northbound shipments than in southbound shipments."

When such tests and standards have been applied by the Commission, this Court has consistently granted summary affirmance of Commission orders imposing commodity and territoral limitations on operating rights sought by motor carriers under the "grandfather clause." *Miami Transportation Company, Inc.* v. *United States*, aff'd. *per curiam*, 332 U. S. 803; *W. H. Tompkins Company* v. *United States*, aff'd. *per curiam*, 329 U. S. 683; *Deaton Truck Lines, Inc.* v. *United States*, aff'd. *per curiam*, 326 U. S. 680; *Jack Cole Company, Inc.* v. *United States*, 59 F. Supp. 10, aff'd. *per curiam*, 324 U. S. 822; and *The Pyramid Moving Company* v. *United States*, 57 F. Supp. 278, aff'd. *per curiam*, 322 U. S. 715.

For the foregoing reasons it is clear that this appeal presents no substantial question. It is,

therefore, respectfully submitted that the judgment of the District Court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

DECEMBER, 1951.

I certify that a copy of the foregoing Motion to Affirm was served upon counsel for all parties of record by mail this 12th day of December, 1951.

WILLIAM J. HICKEY,
Special Assistant to the Attorney General.

APPENDIX

EXCERPTS FROM DISTRICT COURT'S OPINION IN CIVIL ACTION NO. 4974, HEARD AND DETERMINED CONTEMPORANEOUSLY WITH THE PRESENT CASE.

The order of November 12, 1940 was an order disposing of all parts of the applications of Riss & Co., and Illmo. At any time subsequent to 30 days thereafter, a suit might have been brought in the United States District Court seeking to enjoin the Commission's orders. However, under the aforesaid rule, there is an exception which apparently authorizes the Commission to grant leave to file such a petition for reconsideration after the limitation period provided in the rule.

Upon disposition by the Commission of such a delayed or belated petition, filed pursuant to leave, an action for the review of the Commission's order would lie under the section of the Transportation Act above cited. There is no limitation upon the time when a petition for reconsideration may be filed by leave of the Commission. Thus it would seem that no action of the Commission on any matter of denial ever becomes final, and may always be subject to review of the court, in the event the Commission grants leave to file a petition for reconsideration, and thereafter overrules it for any cause.

However, the mere fact that the court may have jurisdiction by reason of the Commission's action in overruling a petition for reconsideration does not necessarily mean that the court is compelled to review the proceedings and the evidence, and is precluded from determining that the plaintiff has failed to exhaust its administrative remedies. It

may be that the plaintiff failed to properly present the matters complained of to the Commission, in order that the Commission might correct any error, oversight or failure to consider some particular bit of evidence respecting some specially designated question. This reasoning we think, should apply to the discrepancy between the Division's order and the certificate. If there was an error, the Commission's attention should have been specifically and definitely called to it.

* * *

The Petition for Reconsideration filed on October 11, 1946 sought a rehearing of all the applications MC-200 to MC-200 (Sub. No. 46), to the grandfather rights of plaintiff, and not to correct an error in the certificate. The Commission has the authority to correct its errors, if there were errors. We cannot say whether there were or not until the Commission has determined that question. If there were no errors, then a finding and conclusion of the Commission should be requested by the plaintiff so that a court may determine whether or not the difference between the Commission's order describing the routes to be served by the plaintiff and the routes described in the certificate, was based upon substantial evidence, or was arbitrary and capricious.

The Petition for Reconsideration, which did not specifically call the discrepancy to the attention of the Commission, was overruled *without* opinion or comment. Until that issue is determined by the Commission, the court cannot determine whether the Commission's action is sustained by substantial evidence or is arbitrary or capricious. The

question is therefore not yet ripe for judicial review.

We next come to the question of the segments of routes serving Wichita Falls, Fort Worth and Dallas, Texas, and Salt Lake City and Ogden, Utah. The Government makes the same contention to this issue as to the one just determined . . . that the plaintiff has not exhausted its administrative remedies, and therefore this court is without jurisdiction to determine the question. In this connection we think the question is distinguishable from that just discussed, and that the Government is in error.

The petition of October 11, 1946 requested reconsideration of all the grandfather rights sought in all its applications, and which had been denied. Although plaintiff had apparently acquiesced in the order of the Commission granting the certificate of December 30, 1941 until the filing of its application to file a petition for reconsideration in 1946, the application was nevertheless granted, and the petition was filed and subsequently denied. No additional testimony was offered, and the denial was without opinion.

While the Government's contention may to some extent be correct in that the plaintiff did not, in its Petition for Reconsideration call the Commission's attention to its failure to give proper consideration to the evidence, and to make definite findings as to specific questions, it would seem that the statutory requirement for review has been met. But, in the court's determination of the plaintiff's contention as to whether or not the orders of the Commission were arbitrary, capricious and in opposition to the evidence in the record, we think

the court may take into consideration the state of mind of the plaintiff over the period of five years, during which time it apparently acquiesced in the findings and conclusions and orders of the commission, and so far as the record is concerned, made no attempt to have it set aside.

* * *

In view of what we have heretofore said, we are not willing to sustain the defendants' contention. However, the long period of acquiescence without official complaint, its positive statements respecting the order above quoted, is most persuasive that plaintiff did not feel that the Commission's findings and orders were unsupported by substantial evidence, and were arbitrary and capricious. We think it was a question entirely within the jurisdiction of the Commission to determine—and we cannot say that its findings and conclusions and orders were unsupported by substantial evidence, and were arbitrary and capricious.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 541

RISS AND COMPANY, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MOTION OF INTERSTATE COMMON CARRIER COUNCIL OF MARYLAND, INC., ET AL., TO AFFIRM

JOHN R. NORRIS,
JAMES J. DOHERTY,
Counsel for Appellees,
Interstate Common Carrier
Council of Maryland, Inc., et al.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

CIVIL ACTION NO. 4806

RISS AND COMPANY, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants;

INTERSTATE COMMON CARRIER COUNCIL OF MARYLAND, INC., JOINT NORTHEASTERN MOTOR CARRIER ASSOCIATION, INC. AND CONTINENTAL TRANSPORTATION LINES, INC., ET AL.,

Intervenors

MOTION TO AFFIRM

Intervenors, Interstate Common Carrier Council of Maryland, Inc. and Joint Northeastern Motor Carrier Association, Inc., comprise in their total membership 93 common carriers by motor vehicle operating under authority of the Interstate Commerce Commission within the area affected by the instant proceeding. Similarly Continental Transportation Lines, Inc. is a common carrier by motor vehicle operating by virtue of authority issued to it by the Commission, and this carrier also operates within this affected area. These two associations of motor carriers and this

individual motor carrier participated in all proceedings had before the Commission and before the United States District Court for the Western District of Missouri, Western Division, in support of the orders of the Commission which are under attack herein.

Intervenors, in accordance with Rule 12, Paragraph 3 of the Revised Rules of the Supreme Court of the United States, move that the judgment and decree, entered in the within action on September 27, 1951 by a specially constituted United States District Court of Three Judges, be affirmed. This final judgment and decree dismissed Appellant's complaint seeking to set aside two orders of the Commission dated February 3, 1945 and October 4, 1948. On November 23, 1951, the United States District Court granted Defendants' and Intervenors' motion to strike Plaintiff's motion for a new trial, and on the same date denied Plaintiff's motion for an injunction pending appeal. Appeal was allowed on November 26, 1951.

The two orders of the Commission, heretofore referred to, granted to Appellant substantial operating authority as a result of an application filed by Appellant's predecessor in interest, Monark Motor Freight System, Inc., under the provisions of the "grandfather clause" of Section 206(a) of the Interstate Commerce Act, as amended (49 U. S. C. 306(a)). These two orders of the Commission permitted Appellant to continue operations as a common carrier by motor vehicle of general commodities, with certain exceptions, over a great number of specified regular routes, and of specified commodities within an extensive irregular route territory, and denied to Appellant authority to conduct operations over certain other claimed regular routes and within certain other claimed irregular route territory.

The Court's attention is respectfully called to the fact that the Certificate of Public Convenience and Necessity issued to Appellant on February 21, 1951, covering the

authority granted, is reproduced in the Appendix to the Motion to Affirm filed on behalf of the United States of America and the Interstate Commerce Commission. The Court's attention is further called to the summary of the various proceedings had before the Commission and the United States District Court with respect to the above "grandfather" application, said summary appearing as Footnote 2 on Page 1 of the said Motion to Affirm. Intervenors respectfully adopt the aforesaid Appendix and Statement of Proceedings as a correct and accurate statement of Appellant's operating authority as prescribed by the Commission, and of all actions had before the Commission and the United States District Court concerning this application.

Briefly stated, Appellant's contentions on appeal are as follows: (1) the Commission's denial of certain claimed "grandfather" authority is unsupported by or contrary to the evidence of record, is not supported by adequate findings, and is contrary to the spirit and intent of the Interstate Commerce Act; (2) the United States District Court erred in that it failed to remand the entire proceeding to the Commission because the Court had held, in its opinion, that no specific finding had been made as to the grant or denial of a single short route included in an application covering practically every town and city in the Central United States, Middle Atlantic and New England areas; (3) the orders of the Commission contain only general, indefinite and inadequate findings which are in variance with the facts of record; (4) the United States District Court's judgment sustaining the Commission's order is not supported by the evidence of record; and (5) the United States District Court misconceived the statutory function of the Commission in its determination of "grandfather" applications.

A careful analysis of Appellant's Assignment of Errors and Statement as to Jurisdiction reveals conclusively that the only issues raised by the instant appeal are those issues which normally arise when an applicant for "grandfather" authority seeks judicial review of a Commission determination of such application. Furthermore, a careful analysis of the United States District Court's entire opinion demonstrates that this Court fully understood the principles of law applicable to such actions and, after eighteen months of careful study of the massive record before it, correctly applied these principles in reaching its conclusions.

The only real issue raised by the complaint filed with the United States District Court and by this appeal is whether or not the findings of the Commission, relative to bona fide operations prior and subsequent to June 1, 1935 by Appellant and its predecessor in interest, are supported by the evidence of record. The United States District Court determined that the findings were so supported and, in doing so, adopted the correct principles of law as laid down by this Court in frequent decisions, particularly in *U. S.* v. *Carolina Carriers Corporation*, 315 U. S. 475, wherein it was stated at pages 480-481:

> The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission . . . The Act provides the test of "bona fide operation". That standard carries the connotation of substantiality. It also makes clear that a holding out to serve a specified area is not alone sufficient. It is "actual rather than potential or simulated service" which is required. *McDonald* v. *Thompson*, 305 U. S. 263, 266. Substantial, as distinguished from incidental, sporadic, or infrequent, service is required. Substantial service actually rendered may have been confined to narrow limits. *Loving* v. *United States*, 32 F. Supp. 464, aff'd 310 U. S. 609. *Ability to render the service throughout the*

> *wide reaches of the territory*, which the applicant professed to be willing to serve, *may not have existed.*
>
> * * * * * * *
>
> . . . *While service to and from all points in the States included in the application was not allowed, the reduction was determined by the standard of substantiality of service.* . . . (Italics supplied.)

(and at pages 483, 486):

> It is plain that a carrier's holding out and actual performance may be limited to a few articles only. That is to say, he may be a common carrier only of a restricted number of commodities. . . . Or the service actually rendered may have been confined to such a few commodities that his holding out or willingness to carry a much larger class may be disregarded.
>
> * * * * * * *
>
> . . . an applicant's status may vary from one part of the territory to another or be different in northbound shipments than in southbound shipments.

This Court has repeatedly upheld the principles laid down in its decision in the *Carolina Carriers Corporation* case by summary affirmance of Commission orders imposing commodity and territorial limitations on operating rights sought by motor carriers under the "grandfather clause" when such tests and standards were applied and used by the Commission in reaching its determination as is the situation in this proceeding. *Miami Transportation Company, Inc.* v. *United States*, aff'd *per curiam*, 332 U. S. 803; *W. H. Tompkins Company* v. *United States*, aff'd *per curiam*, 329 U. S. 683; *Deaton Truck Lines, Inc.* v. *United States*, aff'd *per curiam*, 326 U. S. 680; *Jack Cole Company, Inc.* v. *United States*, 59 F. Supp. 10, aff'd *per curiam*, 324 U. S. 822; and *The Pyramid Moving Company* v. *United States*, 57 F. Supp. 278, aff'd *per curiam*, 322 U. S. 715.

Appellant's attempt to misconstrue the principles which were followed by the United States District Court in reaching its determination of the proceeding before it by the quotation of sentences out of context and by the raising of issues as to which it had never requested a determination by the Commission, is complete substantiation of Intervenors' contention that the issues raised by this appeal are not substantial legal issues which require determination by this Court but are simple factual issues which have long since been correctly decided by the Commission.

For the foregoing reasons it is obvious that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the United States District Court should be affirmed.

JOHN R. NORRIS,
JAMES J. DOHERTY,
Attorneys for Intervenors.

December 11, 1951.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 541

RISS & CO., INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MOTION OF SPECTOR MOTOR SERVICE, INC., TO AFFIRM

CARL L. STEINER,
Counsel for Appellee,
Spector Motor Service, Inc.

AXELROD, GOODMAN & STEINER,
Of Counsel.

IN THE DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Civil Action No. 4806

RISS & CO., INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, INTERSTATE COMMON CARRIER COUNSEL OF MARYLAND, INC., ET AL., AND SPECTOR MOTOR SERVICE, INC.,

Defendants

MOTION OF INTERVENER, SPECTOR MOTOR SERVICE, INC., TO AFFIRM

Intervener, Spector Motor Service, Inc., is a common carrier by motor vehicle, operating by virtue of authority issued to it by the Interstate Commerce Commission in Docket No. MC-69116, and operates in interstate commerce in many of the various states affected in this proceeding, and particularly in the State of Connecticut. Spector Motor Service, Inc. participated in the original proceedings before the Interstate Commerce Commission and was a party of record in the United States District Court, for the Western Division of Missouri, Western Division, in support of the orders of the Interstate Commerce Commission, which are the subject matter of the appellant's appeal.

Pursuant to Rule 12, Paragraph 3, of the revised rules of the Supreme Court of the United States, Spector Motor

Service, Inc. moves that the judgment and decree of the District Court, entered in the above entitled cause on September 27, 1951, be affirmed. By this judgment and decree the District Court dismissed appellant's complaint, which sought to set aside two orders of the Commission, dated February 3, 1945, and October 4, 1948, respectively. Subsequent to the issuance of this judgment and decree, appellant filed motions for a new trial and for an injunction pending appeal. The defendants and interveners filed a motion to strike appellant's motion for a new trial. On November 3, 1951, the District Court granted defendants' and interveners' motion to strike the motion for a new trial and denied appellant's motion for injunction pending appeal. On November 26, 1951, appeal was allowed.

The orders of the Commission dated February 3, 1945, and October 4, 1948, granted certain operating authority to appellant, and at the same time denied other claimed operating authority to appellant. On February 21, 1950, the Interstate Commerce Commission issued a certificate of public convenience and necessity to appellant. This certificate set forth all of the operating authority granted to appellant. For ready reference, the certificate has been set forth in its entirety in the appendix to the motion to affirm filed on behalf of the United States of America and the Interstate Commerce Commission. At the same time, these defendants have also compiled a summary of all of the proceedings before the Commission and the District Court, with respect to the proceedings, prior to the action in the District Court and including all of the proceedings in the District Court. This summary appears as Footnote 2 on Page 1 of their motion to affirm, and this intervener respectfully begs to adopt the aforementioned appendix and statement of proceedings as a true and correct statement of the operating authority granted to appellant by the Commission and of all

of the actions concerning this application, both before the Commission and the District Court.

Appellant has set forth eleven assignments of error in support of its appeal. In short, it is the contention of the appellant that (a) the District Court found that the orders of the Commission were supported by substantial evidence, and (b) conversely, that the Court erred in finding that the orders of the Commission were supported by evidence. There is nothing new, novel, or different in the contentions of the appellant. It is respectfully submitted that the District Court, in its lengthy, well-considered, and well-written opinion, carefully analyzed the massive record, and, after taking eighteen months of careful study, correctly arrived at a proper legal conclusion.

There was only one issue before the District Court, and there is only one issue at the present time. The issue is a simple one. Are the findings of the Interstate Commerce Commission in its orders of February 3, 1945, and October 4, 1948, supported by the evidence of record? It is respectfully submitted that the District Court, after prolonged study and painstaking analysis, correctly determined that the answer to the foregoing question was in the affirmative.

The present issue has been determined by the United States Supreme Court, various Circuit Courts of Appeal, and many Statutory Three-Judge Courts, many times. The authorities are numerous. We will not at this time, however, cite all of them. The foremost case which has enunciated these principles is *U. S.* v. *Carolina Carriers Corp.*, 315 U. S. 475. The principles laid down in this case have been upheld repeatedly. Other cases affirming the principles laid down in the Carolina case are *Miami Transportation Company, Inc.* v. *United States*, aff'd. *per curiam*, 332 U. S. 803; *W. H. Tompkins Company* v. *United States*, aff'd. *per curiam*, 329 U. S. 683; *Deaton Truck Lines, Inc.* v. *United States*, aff'd. *per curiam*, 326 U. S. 680; *Jack Cole Company, Inc.* v. *United*

States, 59 F. Supp. 10, aff'd. *per curiam*, 324 U. S. 822; and *The Pyramid Moving Company* v. *United States*, 57 F. Supp. 278, aff'd. *per curiam*, 322 U. S. 715.

It is respectfully submitted that the judgment of the United States District Court should be affirmed, for the reason that this appeal presents no substantial question.

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Spector Motor Service, Inc.

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Chicago, Illinois.

Dated: December 13, 1951.

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Supreme Court of the United States

October Term, 1951.

No. 541

Riss & Company, Inc., a Corporation, *Appellant*,

vs.

The United States of America and Interstate Commerce Commission, *Appellees*,
Spector Motor Service, Inc., and Interstate Common Carrier Council of Maryland, *Intervenors-Appellees*.

On Appeal from the United States District Court for the Western District of Missouri.

BRIEF OF RISS & COMPANY, INC., IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM.

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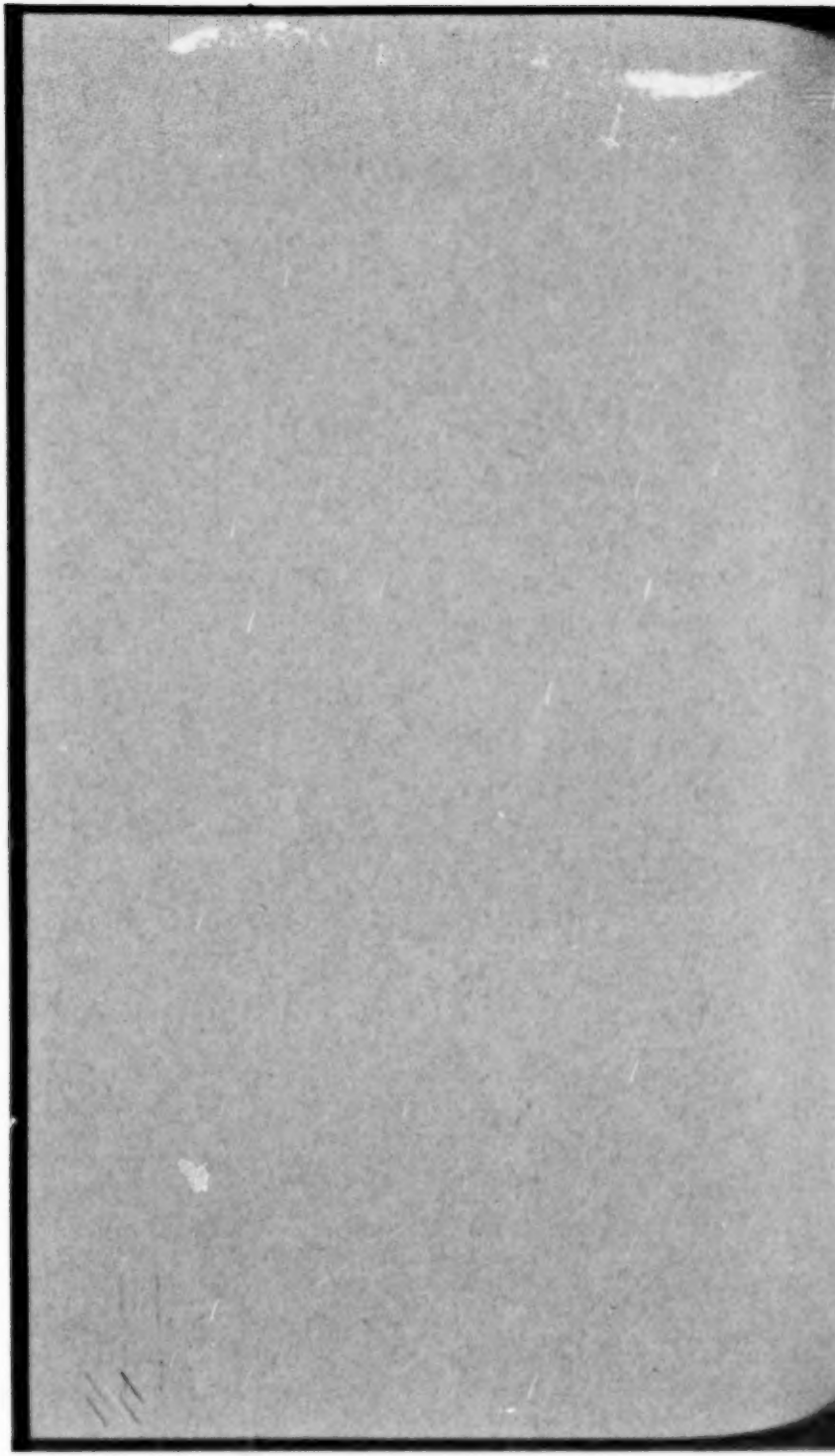

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Supreme Court of the United States

October Term, 1951.

No. .....

RISS & COMPANY, INC., a Corporation, *Appellant*,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees*,
SPECTOR MOTOR SERVICE, INC., and INTERSTATE COMMON CARRIER COUNCIL OF MARYLAND, *Intervenors-Appellees*.

On Appeal from the United States District Court for the Western District of Missouri.

BRIEF OF RISS & COMPANY, INC., IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM.

Pursuant to Rule 12, Paragraph 3, and Rule 7, Paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellant, Riss & Company, Inc., respectfully presents its brief opposing appellees' motion to affirm the judgment of the three-judge district court entered on September 27, 1951. The appeal from this judgment was allowed on November 26, 1951, and appellees' motions to affirm were filed on December 13, 1951.

I.

The Questions Presented Are Substantial.

Appellees' motions erroneously state that the appeal presents no substanial questions in view of the fact that it raises "only the general questions usually presented

in cases arising under the 'grandfather clause.'" The motions describe the issue presented as confined to the determination of the question as to whether or not the findings of the Interstate Commerce Commission are supported by evidence on the record considered as a whole. This is not an accurate or correct statement. It is apparent from the jurisdictional statement and the assignment of errors that, while the question of the evidentiary support of the challenged order was and is one of the important issues in the case, it is by no means the only or even the most substantial issue presented. The primary issue presented is whether or not ultimate findings or conclusions, indefinite and general in character and couched in the language of the Motor Carrier's Act, can be allowed to stand when such findings are premised upon precedent evidentiary findings that are concededly erroneous and admittedly in conflict with the whole of the evidence. The other questions presented include that based upon the absence of findings, the question raised by the failure of the district court to adhere to applicable standard of judicial review and the question arising from the district court's erroneous application and statement of the law respecting the denial of authority to appellant to serve the Commercial Zones of important cities. These issues are clearly of general and substantial importance.

Thus, a very serious question of law relating to judicial review of administrative process is posed by the statement in the opinion that the failure of the Commission to make any findings supporting its denial of authority to use a certain claimed route (U. S. Highway No. 1 between New Haven, Conn., and Boston, Mass.) presents a question "not ripe for judicial review" and that judicial relief from the final order of denial should be refused. Where the Commission has made no finding respecting

this important claimed right and the district court fails to remand the proceeding for appropriate action it is manifest that the general application of the express statutory reservation of the right to operate in accordance with all claimed rights while there is pending a proceeding to establish "grandfather rights" is thus effectively obliterated from the Motor Carrier's Act. The theory of the district court that the absence of findings in an order does not authorize action by the reviewing court thus results in nullification of one of the basic provisions of the act.

In sustaining the denials of authority to serve the Commercial Zones (as established by the Commission in general orders) surrounding a number of important terminal cities, the holding of the district court that the Commission "must take into consideration certificates and rights which have been granted to other carriers" in a "grandfather rights" case, upon the face of the opinion raises a very important issue of law. Moreover, the refusal of the district court to adhere to applicable standards of judicial review presents an issue manifestly of the utmost importance and substance, involving, as it does, problems basic to the administrative process and the effect of administrative action upon the individual rights.

It is therefore wholly unrealistic to attempt to reduce the issues in this case to the relatively simple issue of whether or not there is substantial support in the record for the findings made. The principal issue presented becomes important and takes on its true character by reason of the fact that the initial findings of fact are admittedly in error. This issue is one that relates to the character of the order and the nature of the consideration given the evidence rather than the question as to whether or not there was in the record any evidence to support the conclusions reached. Had the Commission actually considered,

or from the terms of the order could be assumed to have considered, *all* the evidence of record and then denied appellant certain operating rights, the problem would be, as appellees state, one of determining whether substantial evidence supported the conclusions reached. But that is not the issue here. Where concededly and by express statements in the order weighed in the light of the evidence, much of the competent and relevant evidence was ignored, the reviewing court in order to support the Commission's order must assume the role of the agency and attempt to decide that, considering *all* the evidence, the administrative decision would again be the same. This a court may not do without usurping administrative power. The Commission alone, by reason of its expertise, is qualified to answer such questions. Moreover, where the ultimate findings are so general that it is impossible to know the real basis for the denial of the right to operate to and from a particular point, the reviewing court cannot adequately decide whether or not there is substantial evidentiary support for the denials.

Appellees' motion to affirm effectively brings out this precise point. Appellees admit that it was conceded in the district court that the Commission's evidentiary findings respecting the shipments to and from numerous points on the authorized regularly served routes were inaccurate and in many instances failed to reflect pertinent and uncontradicted evidence. Appellees then argue that such disregard of evidence was immaterial in view of the fact that other general findings which were in the nature of conclusions of fact, correctly reflecting the evidence, established lack of bona fide operation to these points. It is contended that the same conclusions would have been reached had the evidentiary findings been correctly and fairly made. This clearly illustrates the inade-

quacy of the findings. In the first place, appellant is unable to discover general findings "correctly reflecting the evidence" or correcting any of the many errors in the evidentiary findings, and secondly, it is plainly impossible for appellant or the reviewing court or the appellees to determine the basis upon which the denial as to any particular intermediate point was predicated in view of the indefinite and general nature of the findings or conclusions. Thus the appellees may say, as they do, that notwithstanding that the Commission may have erred in stating that there had been no shipments to or from a particular intermediate point prior to the critical date, its denial was still correct inasmuch as the denial may be supported by applying a different or another test of bona fide operation, such as sufficient continuity of service *after* the critical date.[1] In order for appellant to show that the basis for such denials was erroneous or false, it must, in advance, be notified of the reasons upon which the denial rests. Otherwise, appellant, not being advised of the actual reason for the denial, must show that as to each and every one of the possible bases for denial of

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[1]As to continuity of service, the order of February 3, 1945, contains general statements or findings to the effect that (1) the "Applicant and its predecessors have, since prior to June 1, 1935, held themselves out to transport over the claimed regular routes any kind of freight suitable for their equipment, by means of solicitation by letter, telephone, and telegraph, and by personal calls on shippers and receivers of freight throughout the general territory here considered," and (2) that the routes between the termini—such as between New York or Chicago and Kansas City—were continuously operated. Such findings contained in the order itself establish the fact that at all times both before and after the critical date, service was continuously available, and shipments were at all times solicited at the great majority of the intermediate or off-route points to which future service is denied by the order. In many other orders the Commission has held that under such a showing as to service specific evidence as to actual shipments received or delivered at intermediate points is unnecessary and the certificate to be issued covering the route and the termini will not be restricted to deny service at the intermediate points. See *John Richards, Common Carrier Application*, 27 M. C. C. 489; *Trans-American Freight Lines, Inc., Common Carrier Application*, 28 M. C. C. 493; *Spector Motor Service, Inc., Common Carrier Application*, 32 M. C. C. 443; *M. F. Nevitt, Common Carrier Application*, 4 M. C. C. 298.

rights, the Commission not only erred in its holdings but that the order upon every *conceivable* basis was entirely without substantial evidentiary support. Such a requirement places an unfair, in fact, an impossible, burden upon one who seeks review of an administrative order.

In order that the Commission's conceded disregard of evidence may be clarified there is attached hereto and made a part hereof, excerpts from an exhibit prepared by appellant and introduced in the district court. These excerpts, marked Appendix "A," clearly demonstrate the wholesale manner in which the Commission ignored pertinent evidence in the record before it. As to a particular denied point, this exhibit is designed to show, first, the Commission holding with regard to the denied point, second, a tabulation of the shipments disclosed by the evidence to have been carried to and from this point, and third, the shipments which were disregarded by the Commission and which are not contained in the initial or preliminary findings of fact. Similar disclosures to those attached were made to the court with respect to a total of some 69 major intermediate and off-route points denied to appellant by the Commission. In this manner, appellant demonstrated to the district court that the Commission had ignored substantial amounts of evidence which were derived from exactly the same source as the evidence considered by the Commission.

It cannot be claimed that these omissions of evidence were trifling or insignificant. In the case of Hartford, Connecticut, the Commission failed to consider over 58% of all the shipments shown in the record. With respect to Bayonne, New Jersey, the error is in excess of 32% of all shipments shown, and in Niagara Falls, New York, over 29% of all shipments were ignored. The evidentiary findings omit over 39% of all shipments prior to 1938 in the case of Camden, New Jersey. The other points contain

errors proportionately as great.[2] It was upon this erroneous and inaccurate basis that the ultimate findings were made denying appellant authority to operate.

Although this exhibit was introduced in the district court and both appellants and appellees devoted considerable portions of their arguments and briefs to a discussion of its disclosures, one can closely search the opinion of the district court without finding a single reference to the fact that the Commission admittedly ignored large amounts of evidence. The district court merely quotes extensively from the orders challenged and concludes that seemingly the Commission had considered all the evidence. Appellant respectfully submits that the district court plainly failed to review the whole record and refused to adhere to the required standards of judicial review. The motions to affirm do not in any way meet this issue.

One other point raised by appellees' motions may be dealt with quickly. Appellees the United States and the Interstate Commerce Commission attempt, by way of a footnote reference and by appending to their motion portions of an opinion in a companion case not involved in this appeal, to imply that appellant did not specifically bring to the Commission's attention in its petition for reconsideration all the points raised in this proceeding. As to this, it is sufficient to state that appellant did adequately present its claims of error to the Commission many times, as recognized by the district court.

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[2]It should be noted that all the shipments of record, including both those recognized and those ignored by the Commission, were derived from the same exhibits in evidence before the Commission. Moreover, it should be kept in mind that these shipments were stated to be representative only, consisting of approximately 5% of the total shipments actually available as proof.

II.

Appellees' Motions to Affirm Were Not Timely Filed.

Appellant feels itself compelled to direct the court's attention to the fact that neither the motion to affirm of appellees the United States and the Interstate Commerce Commission nor the similar motions of the intervenors were filed in the district court within the time required. Rule 12, Paragraph 3 of the Revised Rules of the Supreme Court of the United States permits appellees to file a motion to affirm with the clerk of the court possessed of the record provided this is done within fifteen days after service upon appellees of the papers required by Rule 12, Paragraph 2. Appellant personally served appellees the United States and Interstate Commerce Commission with the order allowing appeal, the jurisdictional statement and other required papers on November 27, 1951, by delivering these papers to them or their agents at their offices in Kansas City, Missouri. The service of the papers as to the intervenors was by mail on the same day.

Therefore, under Rule 12, Paragraph 3, appellees had until December 12, 1951, in which to file their motion with the clerk for the district court in the Western District of Missouri, Western Division, inasmuch as this Court still possesses the record. However, although the motion was mailed on December 12, 1951, it was not filed with the clerk until December 13, 1951. This was without the time permitted and appellant respectfully submits that the court's ruling upon appellant's jurisdictional statement should be without reference to the appellees' motion to affirm.

Conclusion.

In view of the fact that appellees' motions to affirm were not timely filed, erroneously attempt to reduce the issues presented by this appeal to a simple, single issue and wholly fail to meet or detract from the substantial and important nature of the questions presented, appellant respectfully submits that said motions should be overruled.

Respectfully submitted,

JOHN B. GAGE,
WENDELL BERGE,
A. ALVIS LAYNE, JR.,
Attorneys for Appellant
Riss & Company, Inc.

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Appendix A (cont'd)

Route	Point Denied	Finding of Commission
6	Sioux City, Ia.	No shipments were transported to or from this point prior to June 1, 1935. Six shipments were carried to or from such point during the interim period. Thereafter 5 shipments were handled to or from this point in Nov. 1936, and four (4) in Dec. 1936. Applicant transported 4 shipments in 1938 and 4 in 1939 to or from Sioux City, and none thereafter.

Shipments Shown in Record

Pro.No.	Date	Commodity	Point	Record Ref. Exh.	Record Ref. Page
18974	6/13/35	Butter	N.Y.C.	63	289
18975	6/14/35	Butter	N.Y.C.	"	289
26042	8/6/35	Sewing Machine	Cleveland, Ohio	"	289
26260	8/29/35	Iron Dampers	"	"	289
30617	9/5/35	Liquor	N.Y.C.	"	289
25582	9/11/35	Toys	Chicago, Ill.	"	289
24540	9/30/35	Velocipedes	Cleveland, Ohio	"	289
31754	10/2/35	Liquor	N.Y.C.	"	289
33932	10/4/35	Envelopes	Chicago, Ill.	"	289
20918	11/11/36	PNP	"	"	289
20917	11/11/36	WHEAT	"	"	289
20916	11/11/36	"	"	"	289
20915	11/11/36	"	"	"	289
20914	11/11/36	"	"	"	289
20944	12/1/36	Cocoanut	"	"	289
97078	12/1/36	Mdse.	"	"	289
20952	12/4/36	PNP	"	"	289
98669	12/21/36	Mdse.	"	"	289
85570	1/19/37	Mdse.	"	"	289
54898	5/28/37	Polish	"	"	289

Shipments Not Considered by the Commission

No.	Commodity	Dates
5	Order states 6 shipments from Sioux City during interim. There were 9.	
1	Mdse.	1/19/37
1	Polish	5/28/37
5	Total	

Appendix A (cont'd)

Route	Point Denied	Finding of Commission
6	Sioux City, Ia.	

Shipments Shown in Record					Record Ref.	
Pro.No.	Date	Commodity	Point		Exh.	Page
17338	11/2/37	Fruit	Chicago, Ill.		[illegible]	289
18584	11/19/37	Cereal	"		"	289
57336	5/20/38	Vege-tables	N.Y.C.		"	289
57422	5/23/38	Candy	"		"	289
23348	9/13/38	Maga-zines	Chicago, Ill.		"	
23315	9/13/38	"	"		"	289
161060	1/26/39	Granite	K.C., Mo.		"	289
15647	2/2/39	Glue	E.Chicago, Ind.		[illegible]	289
19910	3/9/39	Cato-logues	Chicago, Ill.		"	289
171794	7/24/39	[illegible]	Jersey City, N.J.		"	289

Shipments Not Considered by the Commission		
No.	Commodity	Dates
5 (cont'd)		
1	Fruit	11/2/37
1	Cereal	11/19/37
[illegible]	Total	

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Appendix A (Con't'd)

e	Point Denied	Finding of Commission	Shipments Shown in Record				Record Exh.	Ref. Page	Shipments Not Considered By the Commission		
			Pro.No.	Date	Commodity	Point			No.	Commodity	Date
Route A	Camden, N. J.	In the interim period, applicant transported one shipment of poultry from Omaha, one of trunks from Chicago, one each of dampers and drugs from Cleveland, and one of poultry from Sedalia, to Camden. On October 21, 1936, a shipment of poultry was handled from Kansas City to Camden. In 1937, applicant carried 13 shipments of 7 different commodities from Chicago to Camden, seven of soap from Camden to Omaha, and one shipment each of books and pencil sharpeners from Camden to Kansas City. In 1938 through 1941, a fairly substantial number of shipments of various commodities were transported between Camden and several points on applicant's routes, principal of which are Chicago, St. Louis, Pittsburgh, Cleveland, Cincinnati, Indianapolis, and St. Louis. No shipments are shown prior to June 1, 1935, or in 1936.	1748	10/1/34	Poultry	F.Kansas City, Mo.	48	36	7	Poultry	10/1/34.
			2362	10/30/34	"	"	48	36			10/30/34.
			2376	10/31/34	"	"	48	36			10/31/34.
			3600	12/15/34	"	"	48	36			12/15/34.
			3601	12/15/34	"	"	48	36			12/15/34.
			19445	6/21/35	"	F. Omaha, Nebr.	63	195			6/26/36.
			32207	6/26/35	Trunks	F. Chicago,Ill.	63	23			10/10/36
			26008	8/2/35	Iron Damper	F. Cleve.,Ohio	63	215	11	Miscellaneous Commodities	1937
			29760	8/8/35	Poultry	F.Sedalia,Mo.	63	214	18	Total	Impossible to designate exact shipments not considered by Commission because of generality of statement.
			24621	10/9/35	Drugs	F.Cleve.,Ohio	63	67			
			385	10/21/35	Poultry	F. K.C.,Mo.	63	112			
			16814	8/26/36	Poultry	"	48	36			
			20825	10/10/36	Machine	F.Omaha,Nebr.	35	1			
			61591	1/2/37	Soap	Omaha,Nebr.	63	214			
			53090	2/12/37	Poultry	F. K.C.,Mo.	48	36			
			61722	3/24/37	Grease	Evansville	63	215			
			53239	5/3/37	Poultry	F. K.C.,Mo.	48	36			
			66907	5/4/37	Candy	F. Chicago	63	215			
			64212	6/1/37	Books	K.C., Mo.	63	215			
			66600	6/8/37	Springs	F. Chicago	63	215			
			64239	6/22/37	Books	K.C.,Mo.	63	215			
			55770	6/23/37	Notions	F. Chicago	63	215			
			85869	7/1/37	Springs	"	63	215			
			23114	7/9/37	Springs	"	63	215			
			12091	8/20/37	Pipes	"	63	215			
			12220	8/23/37	Pipes	"	63	215			
			64365	8/27/37	Soap	Omaha	63	215			

N.B. In 1938 through 1941, a fairly substantial number of shipments of various commodities were transported between Camden and several points on applicants routes, principal of which are Chicago, St. Louis, Pittsburgh, Cleveland, Cincinnati, Indianapolis, and St. Louis. The shipments between 1938 and 1941 agree with the record.

Appendix A (Cont'd)

Route	Point Denied
Off Route 10-A (Cont'd)	Camden, N. J.

Shipments Shown in Record				Record Ref.	
Pro. No.	Date	Commodity	Point	Exh.	Page
64376	9/1/37	Books	K.C.,Mo.	63	215
64379	9/1/37	Soap	Omaha	63	215
30393	9/4/37	Poultry	F. K.C.,Mo.	48	36
14163	9/22/37	Relish	F. Chicago	63	215
15519	10/7/37	Books	"	63	215
61466	10/21/37	Soap	Omaha, Nebr.	63	215
61489	11/1/37	"	"	63	215
61501	11/17/37	"	"	63	215
18548	11/18/37	Liquor	F. Chicago	63	216
11547	11/18/37	"	"	63	216
18682	11/20/37	"	"	63	216
18549	11/23/37	"	"	63	216
19233	12/1/37	Pipe	"	63	216
61523	12/6/37	Soap	Omaha, Nebr.	63	216
19688	12/7/37	Liquor	F. Chicago	63	216
20204	12/17/37	Iron	"	63	216
20342	12/20/37	Liquor	"	63	216
61581	12/28/37	Soap	Omaha	63	216
61583	12/29/37	Pencil Sharpeners	K.C.,Mo.	63	216

Appendix A (Cont'd)

ite	Point Denied	Finding of Commission	Shipments Shown in Record				Record Ref.		Shipments Not Considered by Commission		
			Pro. No.	Date	Commodity	Point	Exh.	Page	No.	Commodity	Dates
ite 14	Hartford, Conn.	One shipment of poultry from Omaha prior to the statutory date, and one of liquor from Chicago in the interim period were transported to Hartford. No further shipments were handled until May 1937. Shipments as follows were also transported to Hartford; one shipment of butter from Omaha in 1937 and one in 1938, one of liquor from Schenley in 1939 and two in 1940; two of glass from St. Louis in 1939; one of oil from Cleveland in 1940, and one of oil from Nickliffe, Ohio, in each of 1940 and 1941. Applicant carried one shipment of liquor from Hartford to Chicago in 1937.	10689	5/10/35	Butter	F.Guthrie,Okla.	37	6	2	Glass	3/5/40
			18253	5/31/35	"	" " "	"	"			3/5/40
			18729	6/8/35	"	F.K.C., Mo.	"	"	1	Liquor	5/31/40
			19396	6/29/35	Poultry	F. Omaha, Neb.	41	2	1	Generators	12/30/40
			19801	6/29/35	"	" " "	"	"	1	Fans	6/4/41
			19891	6/29/35	"	" " "	63	5	1	Wire Glass	3/29/39
			32945	10/1/35	Liquor	F. Chic. Ill.	"	5	10	Butter	5/10/35
			24061	10/6/35	Butter	F. K.C., Mo.	37	6			5/31/35
			13526	2/15/36	Butter	" " "	"	6			6/8/35
			81924	5/19/37	Liquor	To Chic. Ill.	63	7			10/6/35
			22942	9/11/37	Butter	F. Omaha, Neb.	63	7			2/15/36
			22026	8/4/38	Butter	F. Omaha, Neb.	41	2			8/4/38
			22027	"	"	" " "	"	"			"
			22028	"	"	" " "	"	"			"
			22071	9/18/38	"	" " "	"	"			9/18/38
			22042	9/11/38	"	" " "	"	"			9/11/38
			22927	8/4/38	"	" " "	63	8	2	Poultry	6/29/35
			91436	1/20/39	Glass	F.St. Louis,Mo.	63	8			
			93993	3/29/39	Wire Glass	" " " "	63	8	18	Total	
			31203	10/21/39	Liquor	F.Schenley,Pa.	63	9			
			57245	12/1/39	"	" " "	63	9			
			186582	5/3/40	Glass	F. St.Louis, Mo.	63	10			
			186581	5/3/40	"	" " "	63	10			
			406202	5/23/40	Oil	F. Nickliffe, O.	63	11			
			5214	5/31/40	Liquor	F.Schenley, Pa.	63	11			

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Appendix A (Cont'd)

Route	Point Denied	Finding of Commission	Shipments Shown in Record				Record Ref.	
			Pro. No.	Date	Commodity	Point	Exh.	Page
Route 14 Cont'd)	Hartford, Conn.		5360	6/21/40	Liquor	F.Schenley, Pa.	G3	11
			6390	6/26/40	"	" " "	"	"
			409169	7/9/40	Oil	F.Cleveland,O.	"	12
			75259	12/30/40	Generators	F.St.Louis, Mo.	"	14
			15224	3/20/41	Oil	F.Wickliffe, O.	"	15
			88288	6/4/41	Buns	F. Cleveland, O.	"	16

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APPENDIX A (Cont'd)

Point Denied	Finding of Commission	Shipments Shown in Record						Shipments Not Considered By the Commission		
		Pro.No.	Date	Point	Commodity	Record Exh.	Ref. Page	No.	Commodity	Date
Worcester, Mass.	No shipments were carried to or from this point prior to December 1935, when one shipment of an unspecified commodity was transported from New York City. In 1936, applicant moved one shipment of can openers from Chicago, and one of merchandise from New York City, to Worcester. In 1937 a shipment of poultry from Atchison to Worcester and in 1938 one of paper from Worcester to Kansas City were handled. a few shipments of certain commodities were transported from Chicago, Cleveland, Indianapolis, and Cincinnati to Worcester, and from Worcester to Kansas City and Chicago, in 1939 and 1940.	16154	4/24/35	Fr.KC-Mo.	Butter	37	6	1	Butter	4/24/35
		17363	5/14/35	Fr.Guthrie Okla.	"	"	"	1	"	5/14/35
		17435	5/16/35	Fr.KC-Mo.	"	"	"	1	"	5/16/35
		18135	5/31/35	Fr.Guthrie Okla.	"	"	"	1	"	5/31/35
		4567	12/26/35	Fr. NYC	-	63	7	1	Cartons	7/17/36
		45612	6/12/36	Fr.Chic. Ill.	Can Openers	63	7	1	Eggs	11/16/37
		40135	6/30/36	Fr.NYC	Mdse.	"	"	1	Liquors	12/11/39
		8586	7/17/36	Fr.KC- o.	Cartons	37	6	1	-	4/11/40
		65271	7/13/37	Fr.Atchison,Kan.	Poultry	63	7	1	Shoes	12/17/40
		30987	11/16/37	Fr.KC-Mo.	Eggs	37	6	1	Wall Paper	2/28/41
		27537	8/25/38	To KC-Mo.	Paper	63	8	1	Shoes	3/1/41
		144670	7/13/39	" "	Wall Paper	"	"	1	Machinery	4/21/41
		144702	8/11/39	" "	" "	"	"	1	Shoes	6/3/41
		144710	8/16/39	" "	" "	"	"	1	St.Wire Springs	7/22/41
		196451	7/28/39	Fr.Chgo	Butter	"	"	1	" "	7/24/41
		196450	"	"	"	"	"	1	" "	8/5/41
		196583	8/12/39	"	Poultry	"	"	1	Machinery	11/7/41
		33860	9/1/39	Fr.Cleve	Filing Cards	"	"			
		57463	12/11/39	Fr.Mannor	Liquors	"	9	17	TOTAL NOT CONSIDERED BY COMMISSION	
		227253	1/6/40	Fr.Chgo.	Butter	"	"			
		168579	1/22/40	Fr.Ind.Ind.	Dresses	"	"			
		229959	1/30/40	Fr.Chgo.	Auto Reg.	"	10			
		230727	2/5/40	"	"	"	"			
		232855	2/22/40	"	"	"	"			

N.B. Commission says - "No shipments were carried to or from this point prior to December 1935..." There were 4 shipments in 1935 prior to December as shown above.

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APPENDIX A (Contd.)

oute	Point Denied	Shipments Shown in Record						Shipments Shown in Record					
						Record Ref.						Record Ref.	
		Pro.No.	Date	Point	Commodity	Exh.	Page	Pro.No.	Date	Point	Commodity	Exh.	Page
4	Worcester, Mass. (contd.)	231678	2/13/40	Fr.Chgo.Ill.	Eggs	63	10	268513	10/31/40	Fr.Chgo.	Fluid	63	13
		169060	2/15/40	Fr.Ind.Ind.	Grinder	"	"	272322	11/26/40	Fr.Chgo.	Auto Grills	"	14
		401549	3/11/40	Fr.Cleveland	RubberBumpts	"	"	419479	12/5/40	Fr.Cleve.O.	Envelopes	"	"
		144576	3/13/40	To K.C. Mo.	Wall Paper	"	"	622810	12/5/40	To KC-Mo.	Wall Paper	"	"
		240832	3/29/40	Fr.Chgo.	Poultry	"	"	274332	12/9/40	"	"	"	"
		500034	3/30/41	Fr.Ind.Ind.	Racks	"	"	622976	12/17/40	To Louisville Ky.	Shoes	"	"
		241445	4/5/40	Fr.Chgo.	Fiberboards	"	11						
		188025	4/11/40	Fr.St.Louis		"	"	624019	2/28/41	To KC-Mo.	Wall Paper	"	15
		404639	4/30/40	Fr.Cleveland	Mlded Milk	"	"	624024	3/1/41	To Louville,Ky.	Shoes	"	"
		405543	5/14/40	"	Heaters	"	"	4730	4/21/41	To Sandusky,O.	Machinery	"	16
		406238	5/23/40	"	Ven.Blinds	"	"	5697	6/3/41	To Louville,Ky.	Shoes	"	"
		408730	6/20/40	"	"	"	"	76682	7/22/41	To Chicago	St.Wire Sprgs.	"	17
		411229	8/16/40	"	"	"	"	76741	7/24/41	"	"	"	"
		501741	5/29/40	Fr.Ind.Ind.	Adv.Matter	"	"	76918	8/5/41	"	"	"	"
		249388	6/10/40	Fr.Chicago	Oil	"	"	21197	11/7/41	To Cleve.O.	Machinery	"	"
		612229	6/14/40	Fr.Cinci.O.	Steel	"	"						
		620702	6/18/40	To Chgo.	Auto Grills	"	"						
		620835	7/3/40	To KC-Mo.	-	"	12						
		409050	7/6/40	"	Wall Paper	"	"						
		409274	7/10/40	Fr.Cleve.O.	Gears	"	"						
		410130	7/25/40	"	Oil	"	"						
		522912	9/24/40	Fr.St.Louis	Zinc	"	13						
		414351	9/26/40	Fr.Cleve.O.	Machinery	"	13						
		265515	10/10/40	Fr.Cleve.O.	Steel	"	"						
		416848	10/30/40	"	Ven.Blinds	"	"						
		416816	10/30/40	"	Faucets	"	"						

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FILED
APR 7 1952
CHARLES E. WYNN

IN THE

Supreme Court of the United States

October Term, 1951

No. 541

RISS AND COMPANY, INC., A CORPORATION,
Appellant,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

PETITION FOR REHEARING OF PER CURIAM ORDER AFFIRMING JUDGMENT BELOW.

Appellant prays that this Court grant rehearing of its Order of March 3, 1952, which affirmed per curiam the judgment of the three-judge United States District Court for the Western District of Missouri, Western Division. Appellant further prays that the Court note probable jurisdiction in this case, set it down for argument, and afford Appellant the opportunity to brief and argue the merits of the substantial questions of law presented and to have the guidance of explanation or citation in the decision of this Court.

STATEMENT.

Appellant filed this action to enjoin, suspend and permanently set aside certain orders of the Interstate Commerce Commission.[1] A three-judge District Court in the Western District of Missouri, Western Division, in a judgment entered September 27, 1951, sustained the orders and dismissed the complaint. Pursuant to Title 28, United States Code, Sections 1253 and 2101 (b) [based on 38 Stat. 208, 219-221 (1913)], Appellant promptly appealed directly to this Court, the appeal being allowed November 26, 1951. Motions to affirm were filed by Appellees December 13, 1951. In the absence of written or oral argument on the merits of the controversy the Court entered its Order, March 3, 1952, as follows:

> *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. Mr. Justice Black, Mr. Justice Reed, and Mr. Justice Douglas are of the opinion that probable jurisdiction should be noted and the case set down for argument.

This Petition raises two issues which Appellant believes have never before been presented to this Court. The decision of both is necessary not only to the correct disposition of this case, but also to the proper exercise of the Court's appellate jurisdiction.

NEW ISSUES PRESENTED.

1. May this Court, under the Urgent Deficiencies Act, deny Appellant the right of appeal as it existed in equity at the time of the passage of that Act?

2. Should this Court affirm this appeal per curiam without announcing reasons or citations which will enable Appellant and future litigants to determine what has been decided?

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[1] For a full statement see Appellant's Statement as to Jurisdiction, pp. 1-7.

I.

CONGRESS PROVIDED THAT THIS APPEAL SHOULD BE DECIDED ONLY AFTER THIS COURT RECEIVED FULL ARGUMENT ON THE MERITS.

A. The Urgent Deficiencies Act of 1913 Provided for Appeals to this Court in the Manner Taken "Under Existing Law in Equity Cases."

The Urgent Deficiencies Act of 1913, 38 Stat. 208, 219-221, required a three-judge District Court to hear bills to enjoin orders of the Interstate Commerce Commission. Congress considered carefully provisions respecting the manner of appealing directly from such three-judge courts to this Court. The House Report provided that the manner of appeal should be the same as that "under existing law from the Commerce Court . . . ."[2] The Urgent Deficiencies Act as finally enacted stated:

> Such appeals may be taken in like manner as appeals are taken *under existing law in equity cases.*[3] (Emphasis supplied)

In adopting this statute, Congress was acting within its constitutional power. Congress was making regulations for the appellate jurisdiction of this Court. U. S. Const. Art. 3, § 2, Sentence 2.

B. The Urgent Deficiencies Act of 1913 is the Governing Statute in this Appeal.

Congress has never altered the substance of the appeal provision of the Urgent Deficiencies Act of 1913. The Judiciary Act of 1925 incorporated by reference the appeal pro-

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[2] "Such appeals may be taken in like manner as appeals are taken under existing law from the Commerce Court to the Supreme Court." H. R. Rep. No. 64, 63rd Cong. 1st Sess. 3 (1913).

[3] The language was altered in the Senate. 50 Cong. Rec. 5408 (1913).

vision of the Urgent Deficiencies Act.[4] Although apparently inadvertently omitted from the 1926 edition, the 1934, 1940, and 1946 editions of the United States Code included the precise language of the appeal provision of the Urgent Deficiencies Act in 28 U.S.C. § 47(a).

Congress, in 1948, enacted Title 28 of the United States Code. 62 Stat. 928. Section 1253 of Title 28 provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

There is no indication in the committee reports or in the legislative debates that Congress had any intention of altering the manner of appeal required by the Urgent Deficiencies Act. Indeed, the Reviser's Notes state that Section 1253 consolidates Section 47(a) with other Sections of the 1940 Code and cite the Urgent Deficiencies Act as a source. 28 U.S.C. Cong. Serv., Reviser's Notes, Section 1253, p. 1823 (1948).

Since there has been no change by Congress, the manner of appeal required by the Urgent Deficiencies Act governs respecting orders of the Interstate Commerce Commission.

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[4] "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a District Court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise. . . .

"(4) So much of 'an act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes,' approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money." 43 Stat. 936, at Section 238.

C. In 1913 an Appeal in Equity Comprehended the Right to Present Full Argument on the Merits.

The manner of appeal to which Appellant is entitled, therefore, must be determined by reference to "existing law in equity cases" in 1913.

The Rules of this Court provided in 1913 that appeal cases would not be heard until a complete record and plenary briefs were received covering the merits of the factual and legal controversy. 222 U. S., App'x 12-15 (1911); 226 U. S. 671 (1912). In the 1910, 1911, 1912, and 1913 terms, cases on appeal were decided only after receipt of briefs and opportunity for oral arguments on law and facts.[5]

The Rules of this Court and its treatment of appeals in equity cases, therefore, shows that the "manner of appeal" provided by Congress in the Urgent Deficiencies Act of 1913 included the right to submit plenary argument on the merits.

D. Only in Comparatively Recent Years Has This Court Disregarded the Manner of Appeal Required by the Urgent Deficiencies Act.

On July 1, 1928, this Court required that an appellant disclose "the basis upon which it is contended that this Court has jurisdiction upon appeal to review the judg-

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[5] During the 1910 through 1913 terms this Court decided all direct appeals from the Commerce Court through written opinions with one exception, *Atchison, T. & S. F. Ry. Co.* v. *United States*, 231 U. S. 736 (1913) ("The Lemon Rate Case") which was decided by memorandum per curiam decision. During these same four terms this Court decided per curiam seven appeals involving bills for injunction brought in United States District Courts. *The Merrimack River Savings Bank* v. *Clay Center, Kansas*, 218 U. S. 655 (1910); *Pochin* v. *Denver, Colorado*, 218 U. S. 66 (1910); *United Railways Co. of St. Louis* v. *St. Louis*, 220 U. S. 607 (1910); *Mercantile Trust Co.* v. *Texas & Pacific Ry. Co.*, 223 U. S. 710 (1911); *Ashon* v. *Conservation Comm'n of Louisiana*, 229 U. S. 606 (1913); *Mayor & Aldermen of Vicksburg* v. *Vicksburg Water Works Co.*, 231 U. S. 739 (1913); *Woodward Cotton Co.* v. *City of Woodward*, 232 U. S. 716 (1914).

ment or decree in question." Rule 12, 275 U. S. 603-4 (1928). In support of this Rule this Court cited *Zucht* v. *King*, 260 U. S. 174, 176-77 (1922). Under this Rule, the Court began dismissing some types of appeals without receiving argument on the merits or giving opinions, presumably on the ground that no substantial Federal question was presented. The *Zucht* case, however, upon which the Court relied, came to the Court on a writ of error from a state court. Although this Court dismissed the case on the ground of insubstantiality, this Court's opinion was rendered only after receipt of the transcript, and full briefs and oral arguments on the merits.

From 1928 to 1939, Rule 12 was not specifically limited to appeals from state courts. During this period, the Court disposed of twelve appeals under the Urgent Deficiencies Act by per curiam affirmances. Full consideration by way of briefs and opportunity for oral argument was afforded appellants in all but one of these cases, except where a negative order was involved or where the three-judge district court otherwise was without jurisdiction.[6] In only

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[6] *Memorandum Per Curiam Affirmances of Three-Judge District Court Decisions on Bills to Enjoin the Interstate Commerce Commission 1928—October, 1939.*

a. The following cases were affirmed only after plenary consideration on the merits:

Brady v. *United States*, 283 U.S. 804 (May, 1931)
Akron, C., & Y. Ry. Co. v. *United States*, 284 U.S. 575 (Oct., 1931)
Montana v. *United States*, 290 U.S. 593 (Nov., 1933)
Indian Valley R. Co. v. *United States*, 292 U.S. 608 (May, 1934)
Missouri Pacific R. Co. v. *United States*, 293 U.S. 524 (Oct., 1934)
Cape Fears Railways, Inc., v. *United States*, 294 U.S. 693 (Jan., 1935)
Mississippi v. *United States*, 307 U.S. 610 (May, 1939)

b. The following case was dismissed for want of jurisdiction in the Three-Judge court:

Wishnatzki & Nathel v. *Railway Express Agency, Inc.*, 293 U.S. 532 (1934)

one case, *A. O. Smith Corporation* v. *United States*, 301 U. S. 669 (1937), did the Court affirm a judgment on the merits without plenary consideration. The affirmance of this case apparently resulted from the fact that the issues were similar to those decided by opinion of the Court in the same term in *United States* v. *American Tin Plate Company*, 301 U. S. 402. During this same period, this Court revised Rule 12 to require the Jurisdictional Statement to include "a statement of the grounds upon which it is contended the questions involved are substantial," again citing the *Zucht* case. 297 U. S. 733 (1936). In 1939 this Court apparently recognized the necessity of affording appellants in cases involving *inter alia* Interstate Commerce Commission orders a full hearing by limiting the substantiality requirement to appeals from state courts. 306 U. S. 694.

In October, 1939, however, contrary both to the governing statute and to its Rule 12, this Court affirmed an appeal involving orders of the Interstate Commerce Commission without full briefs and opportunity for oral arguments on the merits. *Hoey, Doing Business as Midland Service Co.* v. *United States*, 308 U. S. 510 (1939). Such summary procedure was used in six appeals in 1939, 1940 and 1941.[7]

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c. In the following cases there were per curiam affirmances without plenary consideration of the lower courts' orders dismissing the bill for lack of jurisdiction on the ground that the I.C.C. order was negative not affirmative, hence not ripe for review (In this period the "negative order doctrine" was good law.):

George Allison & Co., Inc., v. *United States*, 296 U.S. 546 (Nov., 1935)
Crancer v. *United States*, 305 U.S. 567 (Nov., 1938)
Diamond Tank Transport, Inc., v. *United States*, 305 U.S. 567 (Nov., 1938)

[7] *Memorandum Per Curiam Affirmances of Three-Judge District Court Decisions on Bills to Enjoin the Interstate Commerce Commission. October, 1939—March, 1942.*

a. In the following cases this court affirmed per curiam, without plenary consideration, lower court decisions dismissing for want of equity:

In 1942 this Court revised Rule 12 to conform to the practice that had developed. In *McArthur, Doing Business as Anaconda Van Lines* v. *United States*, 315 U. S. 787, this Court affirmed per curiam an appeal under the Urgent Deficiencies Act, stating: "It does not appear that the questions involved in this appeal are substantial." One week after the *McArthur* decision, Rule 12 was revised (April 7, 1942), making the substantiality requirement applicable to all appeals, including those under the Urgent Deficiencies Act, citing the *McArthur* and *Zucht* cases. 316 U. S. 715. This manner of treating such appeals has been used with increasing regularity since that time.

E. Congress Has Obligated This Court to Consider This Appeal on Its Merits.

In the interests of affording the Court a manageable docket and in allowing the Court to give greater attention to cases deemed of most importance, Congress has divided the appellate jurisdiction of this Court into two categories. Certiorari was chosen as a means of permitting this Court discretion in selecting cases for review from most of the types of cases decided by inferior courts. Appeal, on the other hand, included only cases where review was not discretionary. Congressional definition of these categories

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Hoey, Doing Business as Midland Service Co. v. *United States*, 308 U.S. 510 (Oct., 1939)

Quonah, Acme, and Pacific Ry. Co. v. *United States*, 308 U.S. 527 (Jan., 1940)

Philadelphia-Detroit Lines, Inc. v. *United States*, 308 U.S. 528 (Jan., 1940)

Acme Fast Freight, Inc., v. *United States*, 309 U.S. 638 (April, 1940)

Loving v. *United States*, 310 U.S. 609 (April, 1940)

Ready Truck Lines, Inc., v. *United States*, 314 U.S. 580 (Nov., 1941)

b. The following case was affirmed per curiam only after full consideration on the merits:

Scandrett, Trustees v. *United States*, 312 U.S. 661 (March 10, 1941)

produced the Judiciary Act of 1925, 43 Stat. 936, in which Congress provided for an extremely limited class of cases where appeal to this Court was of right. Frankfurter & Landis, *The Business of the Supreme Court* 280 (1928).

Within the category of cases coming to this Court on appeal Congress carefully has established jurisdictional requirements. The sole jurisdictional requirement established for an appeal of the type here involved is whether the case is within the jurisdiction of the statutory three-judge District Court. 28 U. S. C. §§ 1253, 2325. In this case the jurisdiction of the three-judge District Court has never been questioned.

Congress provided in the Urgent Deficiencies Act for a direct appeal to this Court from a statutory three-judge District Court. The reason being, as stated by Mr. Justice Brandeis in *United States* v. *Griffin*, 303 U. S. 226, at 233 (1938):

> In the opinion of Congress jurisdiction with the extraordinary features of the Urgent Deficiencies Act was justified by the character of the cases to which it applied—cases of public importance because of the widespread effect of the decisions thereof.

Despite the mandate of the Urgent Deficiencies Act, and despite the fact that no one ever has doubted the jurisdiction of the three-judge District Court, this Court has, nevertheless, affirmed this appeal without affording Appellate an opportunity to present full argument on the merits. As a practical matter, the affirmance of the judgment in this case is little different from denial of a petition for a writ of certiorari, though the operative papers bear different names. Appellant respectfully submits that this Court erred in the manner in which it disposed of this appeal. Congress has given considerable care to the determination of this Court's appellate jurisdiction. The entire statutory background for this appeal shows that Congress intended Appellant to have an opportunity to present full arguments on the merits.

II.

THIS COURT SHOULD AFFORD APPELLANT AND FUTURE LITIGANTS AN EXPLANATION OF WHAT HAS BEEN ADJUDICATED IN THIS CASE.

This Court's per curiam affirmance of this appeal signifies either a disposition of the case and a pronouncement of law or merely a termination of litigation in favor of the Interstate Commerce Commission. The Court's Order offers no assistance in ascertaining its significance since it contains no reasons or citations.

Perhaps this Court intended its Order to signify no more than that the lower court's result as between Appellant and the Commission shall stand. If so, the disposition of this appeal for practical purposes is similar to a denial of a petition for a writ of certiorari.

Commentators, however, have expressed the view that the per curiam opinion is a pronouncement of law as well as a disposition between the parties.[8] They have often been critical of this Court's use of the per curiam because it has resulted in embarrassing precedents, confusion and increased litigation.[9] If the Order in this case is a pronouncement of law, the Order must mean that the questions presented by Appellant have been settled beyond possibility of successful challenge or that this Court adopted in all respects the opinion of the lower court. It is difficult to believe that the Order conveys either such meaning. It is difficult to believe, for example, that there is a firmly fixed principle of law that orders of the Interstate Commerce Commission are valid and enforceable even though admittedly the Commission made no findings of fact to support a

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[8] See Frankfurter & Landis, *The Business of the Supreme Court at October Term, 1929*, 44 Harv. L. Rev. 1, 10-11 (1930); *Has The Jensen Case Been Jettisoned?*, 2 Stanford L. Rev. 536 (1950); *The Insubstantial Federal Question*, 62 Harv. L. Rev. 488 (1949); Hart, *The Business of the Supreme Court at the October Terms, 1937 and 1938*, 53 Harv. L. Rev. 579, 601ff. (1940).

[9] Authorities cited in note 8, *supra*.

substantial part of the order. It is difficult to believe that a district court opinion which recites the lack of basic findings but which, nevertheless, sustained the order of the Commission as valid and proper has been adopted by this Court.[10] It is also difficult to believe that there is a fixed principle of law that an order of the Interstate Commerce Commission is valid and enforceable when admittedly the Commission ignored and failed to consider a large portion of the evidence of record in its findings. These are the issues which the court below resolved and which presumably the Order of this Court also resolved. Appellant believes that if these principles are firmly established in the law they are sufficiently important to warrant public expression from this Court.

III.

APPELLANT'S INTEREST IN THIS PETITION.

The order of the Interstate Commerce Commission in this case is in effect. Appellant, therefore, is not prolonging any operations by this Petition.

Appellant is vitally concerned, however, with obtaining a full consideration on the merits of its contentions and a clarification of the decision of the lower court. This petition has been filed because appellant has been effectively denied its statutory right to a hearing on the merits in this Court.

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[10] "In the present case the District Court held that the Commission failed to make any findings whatsoever in explanation of its denial to Riss of authority to operate over U.S. Highway No. 1 between New Haven, Connecticut and Boston, Massachusetts. Nonetheless, although the Court stated that without a specific finding it could not apprehend the reason for the Commission's denial, it failed to remand the proceeding to the Commission for entry of definite and specific findings." Appellant's Statement as to Jurisdiction, p. 9.

CONCLUSION.

For the reasons herein urged Appellant respectfully requests this Court to grant rehearing of its Order of March 3, 1952, to note probable jurisdiction, and to set the case down for argument on the merits of the substantial questions of law presented, affording Appellant an opportunity to brief and to argue orally and giving Appellant and other litigants the guidance of explanation or citation in the decision of this Court.

Respectfully submitted,

JOHN B. GAGE,
WENDELL BERGE,
A. ALVIS LAYNE, JR.,
Attorneys for Appellant,
Riss and Company, Inc.

Certificate.

We hereby certify that the foregoing Petition is presented in good faith and not for delay.

JOHN B. GAGE,
WENDELL BERGE,
A. ALVIS LAYNE, JR.,
Attorneys for Appellant,
Riss and Company, Inc.

No. 541. RISS & CO., INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Western District of Missouri. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. MR. JUSTICE BLACK, MR. JUSTICE REED, and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted and the case set down for argument. *John B. Gage, Wendell Berge* and *A. Alvis Layne, Jr.* for appellant. *Solicitor General Perlman* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission; *Carl L. Steiner* for the Spector Motor Service, Inc.; and *John R. Norris* for the Interstate Common Carrier Council of Maryland, Inc. et al., appellees. Reported below: 100 F. Supp. 468.

No. 545. MUTUAL BENEFIT HEALTH & ACCIDENT AS-